Holly Farms Corporation and its Successor, Tyson Foods, Inc. *and* Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Cases 11–CA–13184, 11–CA–13267, 11–CA–13487, 11–CA–13520, 11–CA–13619, and 11–RC–5583

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 12, 1992, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondents filed exceptions and a supporting brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[3] and has decided to affirm the judge's rulings, findings,[4] and conclusions except as modified below, and to adopt the recommended Order as modified and set forth in full.[5]

1. The judge found that the Respondents violated Section 8(a)(1) by discriminatorily excluding prounion literature from the live haul bulletin boards prior to the election in the live haul unit. The judge credited the testimony of Dimmette, a live haul driver, who testified that employees were allowed to post notices on the boards. Dimmette testified that on several occasions he posted union notices which, unlike other announcements, never remained on the boards for more than a day. Although Dimmette admitted that he never saw anyone take down the notices, the judge found that ''the burden passed to the Respondents, who controlled the bulletin boards to enter a denial or an explanation, which they did not do.'' The Respondents con-

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union. We also correct the judge's reference to Local 657 as Local 567.

[2] The Respondents filed a motion to reopen the record to admit evidence material to the question of alleged majority status in the live haul unit and to the effect of delay on the judge's recommended bargaining order in that unit. The General Counsel filed a motion in opposition to the Respondents' motion, and the Respondents filed a memorandum in opposition to the General Counsel's position. After reviewing the parties' submissions, we deny the Respondents' motion for reasons that will be explained more fully below.

[3] We have accepted the parties' posthearing stipulation for submission of the Holly Farms Retirement Plan as a joint exhibit. However, we have not considered the evidence submitted with the Respondents' exceptions and brief, which is outside the record.

[4] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct certain errors made by the judge. Regarding the judge's Statement of the Case, we note initially that Local 29 has geographic jurisdiction over the unit facilities in Harrisonburg, not Harrisburg, Virginia. Local 71 has geographic jurisdiction over the unit facilities in Monroe, North Carolina, not Virginia. Additionally, the correct unit description for the drivers and yardmen unit as set forth in the certification of representative is as follows:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas facilities; excluding all office clerical employees, and guards and supervisors as defined in the Act.

In sec. III,B,2, par. 1, the judge stated that Sloop was promoted on June 25, rather than September 25, 1989. In sec. III,C,1(d), par. 2, the judge attributed the ''scapegoat'' statement to Absher, rather than to Branscome. In sec. III,C,2(c), par. 9, we do not rely on the judge's statement that employees were arrested for handbilling during the same week that Lankford gave his speech. In sec. III,C,2(f), par. 3, regarding the judge's reference to the coercive interrogation of employee Church, we note that the judge had previously found that the interrogation of Church was not unlawful because Church was an open and active union supporter. In sec. III,C,3(b)(i), par. 5, we note that the effective date for the pay raise for hourly employees that was announced on June 16, 1989, was July 2, 1989. In sec. III,D,2(b), the last word in par. 12 should be west, not east.

We also correct the following case citations: *Rossmore House*, 269 NLRB 1176 (1984); *SMCO, Inc.*, 286 NLRB 1291 (1987); *J. P. Stevens & Co.*, 247 NLRB 420 (1980); and *Quality Aluminum Products*, 278 NLRB 338 (1986).

Regarding the judge's findings of violations of Sec. 8(a)(1) affecting the drivers and yardmen unit, in adopting the judge's finding that Dispatcher Absher's statement to employee Branscome regarding the increased use of outside carriers was coercive, we do not rely on his characterization of the relevance of the fact that Absher and Branscome were friends. Cf. *Pittsburgh & New England Trucking*, 238 NLRB 1706, 1707 (1978), enfd. in part mem. 612 F.2d 1309 (4th Cir. 1979) (solicitations made by a friend who was part of management had greater impact in view of the authenticity and credibility of the source).

Additionally, we find it unnecessary to pass on the judge's finding that Supervisor Murphy's statement to employee Layman that he hoped he did not find out who had sent a union card and that he probably knew constituted an unlawful threat of reprisal, because any such finding would be cumulative and would not affect the Order. For the same reason, we find it unnecessary to pass on the judge's finding that the speech given by Holly Farms President Blake Lovette on February 18, 1989, unlawfully threatened employees with job loss. We further note that no exceptions were filed to the judge's finding that Lovette's January 1989 speech was not unlawful.

With respect to the live haul unit, contrary to Member Oviatt's position in his partial dissent, Chairman Stephens and Member Devaney rely on the Board's prior determination in the representation case that the live haul workers are statutory employees.

Regarding the judge's findings of violations of Sec. 8(a)(1) affecting the live haul unit, we find it unnecessary to pass on the judge's finding that the statement made by Live Haul Manager Ray Lovette to employee Sturgill regarding Sturgill's union cap was coercive, because any such finding would be cumulative. Similarly, we find it unnecessary to pass on the judge's finding that the speech given on March 29, 1989, by Holly Farms Vice President of Human Resources Lankford constituted an unlawful threat of job loss. We note that no exceptions were filed to the judge's finding that Lankford's April 12, 1989 speech was not unlawful.

[5] We have modified the judge's Conclusions of Law, recommended remedy, recommended Order, and notice to conform to the violations found.

tend that the judge erred in finding a violation because there is no evidence that employer representatives were responsible for the removal of the literature. We find merit in the Respondents' contention.

An employer violates the Act by discriminatorily prohibiting the posting of union notices on bulletin boards that are available for general use by employees. *Central Vermont Hospital*, 288 NLRB 514 fn. 2 (1988). Here, the employees had direct access to the bulletin boards and posted notices themselves. Contrary to the judge's finding, the record does not establish that the Respondents controlled the bulletin boards. There is no evidence that the Respondents knew about the union notices, removed them, or authorized their removal.[6] Under the circumstances, we reverse the judge and find that the Respondents did not unlawfully remove union literature from the bulletin boards.

2. The judge found, and we agree, that the Respondents violated the Act by granting the live haul unit employees a wage increase on July 2, 1989,[7] shortly before the scheduled election on July 27. Although we agree with the judge's conclusion and with his analysis of the relevant facts, we do not rely on any presumption that increases granted during a union organizing campaign are unlawful. Rather, we draw an inference of improper motivation and interference with employee free choice from all the evidence presented and from the Respondents' failure to establish a legitimate reason for the timing of the increase. See *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439 fn. 2 (1990).

In terms of timing, the Respondents maintain that the wage increase was not unlawful because both the decision to grant the increase and its announcement on June 16 were made after the Board had dismissed the representation petition in the live haul unit and before the Board on June 20 reordered an election. However, regardless of when the Respondents knew that an election would be held, the salient fact is that the wage increase was both announced and made effective *after* the representation petition was reinstated on April 28. Thus, the wage increase was plainly granted during the union organizing campaign.

The Respondents also contend that the increase was given for legitimate business reasons, as explained in its June 16 letter to employees.[8] We find, however, that even if business at Holly Farms had improved during the spring of 1989, the Respondents have not established a legitimate reason for the timing of the increase. As found by the judge, not only was the wage increase unscheduled, but it was contrary to Respondent Holly Farms' stated policy, set forth in its December 16, 1988 letter to employees, that wage rates would not be raised for 1989. In addition to being against stated policy, the wage increase addressed a primary concern of the live haul employees, who informed Live Haul Manager Ray Lovette in April that the pay from their short 4-day workweek was inadequate. Finally, as emphasized by the judge, the size, timing, and applicability of the increase proceeded entirely at the Respondents' discretion.

The Respondents also contend that the fact that the increase was given to all 11,000 Holly Farms employees who were not represented by bargaining units indicates the lack of an intent to coerce or discriminate against the 201 members of the live haul unit. Although we recognize that the unit employees comprised only a small percentage of the total number of employees receiving the increase, this factor does not persuade us, under the totality of the circumstances here, that the wage increase was not unlawful. In addition to the factors discussed above, we note that at the time the wage increase was given, Holly Farms' production employees were in the midst of union organizing activities.[9] Thus, the wage increase might have been reasonably calculated to discourage union activity throughout Holly Farms. See *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 852 (D.C. Cir. 1984), enfg. 263 NLRB 834 (1982). In this regard, the judge found numerous instances of unlawful conduct designed to undermine the Unions' organizing efforts. See *Q-1 Motor Express*, 308 NLRB 1267 (1992).

Finally, we reject the Respondents' contention that the speech given to the unit employees by Vice President of Human Resources Lankford shortly after the Board ordered the election negated any coercive effect of the wage increase under the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In his speech, Lankford did not admit to any wrongdoing, as required under *Passavant*. Rather, he sought to justify the increase on economic grounds and to put to rest ''the rumor'' that the increase was given because of the election. Additionally, the speech did not occur in an atmosphere free of other unfair labor practices. See *Farm Fresh, Inc*., 305 NLRB 887 fn. 1 (1991). For all these reasons, we agree with the judge

[6] In this respect, the case before us is distinguishable from *Marathon Letourneau Co*., 256 NLRB 350, 357–358 (1981), enfd. 699 F.2d 248 (5th Cir. 1983), cited by the judge, in which there was direct evidence that the union literature was discriminatorily removed by a statutory supervisor.

[7] All dates are in 1989 unless otherwise indicated.

[8] The letter stated in pertinent part:

> This wage increase would not have been implemented until January 1, 1990. However, our markets have been substantially better than planned. Even more importantly, together we have improved efficiency company-wide, thus enabling Holly Farms to implement the wage increase six months ahead of time.

[9] There were about 2000 production workers at Wilkesboro. As of the time of the hearing, no labor organization had filed a petition seeking to represent the production employees.

that the wage increase given to live haul employees was unlawful.

3. The bargaining issues presented concern the relationship between Respondents Holly Farms and Tyson, and their respective bargaining obligations with respect to changes that were made in the transportation division of Holly Farms after its purchase by Tyson. The facts are set forth in full in the judge's decision. In brief, the relevant facts are as follows.

The Unions and Respondent Holly Farms engaged in good-faith bargaining with respect to employees in the drivers and yardmen unit beginning on March 24. The Respondents' attorney, Hogg, was chief spokesperson for the Company, and Blevins, who was secretary-treasurer of Teamsters Local 391, filled that role for the Unions.

The parties stipulated that on July 18, Tyson Foods purchased a controlling interest in the stock of Holly Farms Corporation. They further stipulated that Holly Farms since that date has been engaged in the same business operations at the same location selling the same products to substantially the same customers, and that a majority of the employees were previously employees of Holly Farms. Holly Farms is described in the stipulation as being wholly owned by Tyson Foods.

The judge found that the parties agreed to suspend negotiations during July in order to gain time to clarify Holly Farms' status and bargaining position following the purchase. Negotiations resumed on August 8. At the outset of the meeting, Hogg informed the Unions' negotiators that Tyson representatives were present for informational purposes and were prepared to answer questions about the changes that Tyson planned to implement. More specifically, Hogg stated that Tyson wanted to integrate the western divisions of Holly Farms transportation department[10] with the Tyson transportation system, which would entail some layoffs of drivers. According to Hogg, the eastern division of Holly Farms transportation department[11] would continue to operate under the Holly Farms name, but with a reduced number of drivers and tractors. Union Representative Blevins objected to any reduction in the number of drivers in the east. The parties continued to negotiate contract terms.

The parties met on several other occasions in August.[12] At the September 12 negotiating session, Hogg announced that the Respondents had revised their plan and were going to integrate both the eastern and western divisions of Holly Farms transportation department with the Tyson transportation system. The decision was attributed to the discovery of more backhaul freight than was previously thought to be available. Hogg stated it would no longer be necessary to lay off Holly Farms drivers, who, for all intents and purposes, would become Tyson drivers and would be paid under the Tyson payscale, but would continue to receive Holly Farms fringe benefits as provided for in the merger agreement between Holly Farms and Tyson. Hogg further informed the Unions that the Holly Farms transportation division would no longer exist upon being integrated into the larger Tyson transportation system, and that the Unions would no longer have majority support in the combined group. Regarding the Respondents' bargaining obligations, Hogg repeated several times Respondent Holly Farms' willingness to bargain about the impact of the integration decision but not about the decision itself, but refused Blevins' request to provide the Unions with a copy of the merger agreement. Blevins asserted that impact bargaining was not appropriate, and further stated that, in any event, the Unions did not have certain requested information that was necessary for bargaining.

Also on September 12, Respondent Holly Farms sent its drivers a letter stating that Tyson had assumed all long-distance transportation functions. The letter further stated that Holly Farms drivers were being offered employment as Tyson drivers under the Tyson pay plan, but with Holly Farms benefits to be continued as described in the merger agreement. The letter concluded, ''Please contact John Sloop on or before *September 22, 1989*, for your processing to become a Tyson Foods employee.'' (Emphasis in original.)

The parties continued to exchange correspondence in September and October. In these letters, the Unions requested certain information, including the merger agreement, and demanded bargaining about both the integration decision and the impact of that decision. The Respondents asserted that Holly Farms was willing to bargain about the impact of the integration decision until such time as the integration process was complete, but contended that Tyson had no bargaining obligation because the bargaining unit no longer existed. A copy of the section of the merger agreement relating to employee benefit plans was eventually provided to the Unions, but the Respondents continued to deny the relevance of the agreement in its entirety.

Relying on the parties' stipulation of fact, set forth above, regarding Tyson's purchase of Holly Farms, the judge found that for 2 months following the purchase nothing changed for the former Holly Farms employees, all of whom were retained on the payroll under their existing wages, hours, and terms and conditions of employment. The judge therefore found that as of July 18, Tyson became Holly Farms' successor and employed a substantial and representative complement

[10] The western division consisted of the facilities in Texas.

[11] The eastern division consisted of the facilities in Virginia and North Carolina.

[12] At these meetings, Hogg stated that drivers would not be laid off in the west. Blevins continued to object to any reduction in the driver force in the east, and asked the Respondents to reconsider their decision to remove the Holly Farms drivers in Texas from the bargaining unit.

of employees. The judge further found that because Respondent Tyson did not exercise its right as a successor to set initial terms and conditions of employment for the former Holly Farms employees whom it retained, those terms became established and not subject to unilateral change. In so finding, the judge rejected the Respondents' contention, raised as a defense to the successorship allegation, that as of September 22, the Holly Farms drivers and yardmen unit was accreted into the Tyson transportation system and was no longer an appropriate unit. Rather, the judge found that in both the eastern and western divisions, the former Holly Farms drivers continued to be separately identifiable from the Tyson drivers. Based on his findings of successorship and no accretion, the judge found that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain with the Unions about the August 8 decision, which was later rescinded, to partially integrate the Holly Farms transportation system with the Tyson system, and about the full functional integration decision announced on September 12. The judge further found that the unilateral changes in terms and conditions of employment caused by the integration, including the September 12 job offer to Holly Farms drivers, violated Section 8(a)(5) and (1) and also constituted constructive discharges of the 47 Holly Farms drivers who did not accept employment with Tyson. Finding that the Respondents' conduct on September 12 constituted a withdrawal of recognition from the Unions, the judge rejected the Respondents' contention that the integration of the former Holly Farms drivers into the larger Tyson transportation system constituted an ''unusual circumstance'' that justified the withdrawal of recognition during the certification year.[13]

In rejecting this defense, the judge relied on his findings that the unilateral changes resulting from the integration, and the integration process itself, were unlawful refusals to bargain. Included among those unilateral changes he found unlawful was the change in the Holly Farms pension plan, which was to be continued in effect for only 2 years following the integration. Finally, the judge found that the Respondents violated Section 8(a)(5) and (1) by refusing to provide the Unions with a copy of the merger agreement, which he found to be ''the most authoritative and reliable source'' concerning the continuation of Holly Farms job benefits for those drivers who accepted employment with Tyson.

The Respondents contend that the judge erred in applying successorship principles to the July 18 purchase, which they characterize as a stock transfer which preserved the status of Holly Farms as the employing entity of the unit employees.[14] Based on this theory, the Respondents contend that only Holly Farms, but not Tyson, had and recognized a continuing obligation to bargain with the Unions immediately following July 18. Successorship principles first became applicable, according to the Respondents, when Tyson made the decision to integrate the Holly Farms and Tyson transportation systems, thereby effecting the substitution of one employer for another that characterizes a successor transaction. Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Respondents contend that the decision to integrate operations was motivated by sound business judgment, and was not a mandatory subject of bargaining. More specifically, the Respondents maintain that on September 12, Tyson lawfully established the initial terms and conditions under which it would employ the former Holly Farms drivers, and that it reached a representative complement on September 22, the date by which the employees had to respond to the offer of employment. The Respondents assert, however, that Tyson did not succeed to Holly Farms' bargaining obligation and that the withdrawal of recognition was appropriate because, applying the principles of both accretion and functional integration analyses,[15] the former Holly Farms unit employees became an indistinguishable segment of the Tyson transportation work force, and the certified unit was no longer appropriate. Regarding the Unions' request for a copy of the merger agreement, the Respondents contend that although Holly Farms had an obligation to bargain about the effects of the integration decision, the Unions requested this document in connection with their demand for decision bargaining, and did not demonstrate its relevance as to effects bargaining. Finally, the Respondents contend that the terms of the Holly Farms Retirement Plan provided the Employer with the right to discontinue the plan, and therefore that its termination was not an unlawful unilateral change.

The Board has addressed the distinction between a ''successorship,'' which contemplates the substitution of one employer for another, and a ''stock transfer,'' which involves the continuing existence of a legal entity, but under new ownership. *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1083 fn. 4 (1979). The effect of a change in ownership on labor obligations is, however, a matter to be considered on the specific facts of a particular case. *EPE, Inc. v. NLRB*, 845 F.2d 483, 490 (4th Cir. 1988), enfg. in pertinent part 284 NLRB 191 (1987). Recognizing that a stock sale could serve as a vehicle for the acquisition of resources that will be used to operate a substantially different enterprise from that conducted by the original owners, the court in *EPE* posited:

[13] See *Brooks v. NLRB*, 348 U.S. 96 (1954).

[14] See *Phil Wall & Sons Distributing*, 287 NLRB 1161 (1988).

[15] See, respectively, *Border Steel Rolling Mills*, 204 NLRB 814, 821 (1973), and *Kelly Business Furniture*, 288 NLRB 474, 475 (1988).

> Where the corporate form survives only in name, but an entirely new operation replaces the old, the corporation might not be fairly termed a ''continuing'' employer in any practical sense. Should substantial changes in an operation indicate that its sale was not a ''mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise,'' the obligations of the employer may be governed by successorship principles rather than by continued enforcement of an agreement. [845 F.2d at 490 (citation omitted).][16]

We agree with the judge's finding that Respondent Tyson became a successor of Holly Farms when it purchased a controlling interest in the corporation on July 18, and that its bargaining obligation arose on that date because it employed a substantial and representative complement of unit employees. Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer.

Although Holly Farms continued to exist as a corporate entity, the following factors indicate that at the time of the July 18 stock purchase, Tyson began to implement steps that would result in its substitution as the employing entity of the unit employees. We note that Tyson's initial bid for Holly Farms was made in October 1988, and as early as January 1989, Tyson officials began formulating tentative plans for integrating the Holly Farms and Tyson transportation divisions. As detailed by the judge, ''upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization,'' and performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. Additionally, at the time of the stock purchase, negotiations between the Unions and Holly Farms were suspended to enable Respondent Holly Farms to clarify its status and bargaining position. To that end, on July 14 and 15, management representatives from Holly Farms and Tyson met to discuss the status of the collective-bargaining negotiations, and also Tyson's corporate goals, which became the basis for the subsequent integration plans. The judge found that Holly Farms President Lovette consulted with Tyson officials before instructing the Respondents' attorney, Hogg, on how to present information about integration to the Unions. When collective-bargaining negotiations resumed on August 8, Tyson officials were present to answer questions about the operational changes that Tyson planned to implement. We find, contrary to the Respondents' contention, that Tyson's involvement in the operation of the Holly Farms transportation division as of the time of its acquisition warrants the application of successorship principles as of that date.

Regarding the September 12 offer of employment to the former Holly Farms drivers, having adopted the judge's successorship findings, we also adopt his finding that Respondent Tyson did not exercise its right at the time it purchased Holly Farms to set initial terms and conditions of employment for the former Holly Farms employees and, therefore, that it could not unilaterally change those terms on September 12. Further, as discussed below, although we agree with the Respondents that the decision to functionally integrate the Holly Farms and Tyson transportation departments was not a mandatory subject of bargaining, we disagree with their related contention that Respondent Tyson therefore lawfully commenced integration when it offered the Holly Farms drivers employment as Tyson employees without first bargaining with the Unions.

The Supreme Court in *First National Maintenance Corp. v. NLRB*, above, set forth principles for determining whether a given management decision is a mandatory subject of bargaining. Applying those principles here, we find that the Respondents' decision to integrate the transportation division of Holly Farms with the Tyson transportation system falls within the third category of management decisions identified by the Court, those which have a direct impact on employment but have as their focus only the economic profitability of the business. Such decisions, according to the Court, involve a change in the scope and direction of the business and are akin to the decision whether to be in business at all. For these decisions, the Court held that bargaining would be required ''only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.'' 452 U.S. at 676–679.

The Respondents' testimony at the hearing established that the integration decision had as its focus a desire to improve the economic profitability of the former Holly Farms long-haul transportation division. As described by Charles Irwin, Tyson group vice president of distribution and commodity purchasing, Tyson's transportation system, which was run like a common carrier, generated significant backhaul revenue[17] and was a profit center within the corporation. To achieve this result, Tyson hauled its own products only into areas where it had established backhaul customers, and relied on common carriers to transport its products to areas without backhaul loads, thereby mini-

[16] For example, the Board has applied a successorship analysis to determine the bargaining obligation of a corporation that continued to exist, but as an integrated subsidiary of the larger purchasing corporation and with some alteration of its business operation. See *Spencer Foods*, 268 NLRB 1483 (1984), enf. granted in part sub nom. *Food & Commercial Workers Local 152 v. NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985). We note that both the Board and the court in *Spencer Foods* applied successorship principles, but disagreed as to whether there was substantial continuity of operations.

[17] ''Backhaul'' refers to the delivery of products for other companies as part of the return trip to the Tyson facilities.

mizing its empty mileage ratio. According to Irwin, the Holly Farms transportation department, by contrast, existed primarily to transport Holly Farms' products to customers, had a substantial amount of empty mileage on the backhaul portion of its business, and was losing money. Irwin testified that Tyson hoped, through integration of the transportation departments and application of the Tyson corporate philosophy and policies, to decrease Holly Farms' empty mileage ratio and increase its backhaul revenues with an eye toward earning a profit. Based on Irwin's uncontroverted testimony, we find that the planned functional integration had as its focus the economic profitability of Holly Farms' transportation division, and involved a change in the scope and direction of the division. See *First National Maintenance*, above.

Having found that the integration decision was economically motivated, we next apply the balancing test described in *First National Maintenance* to determine whether the Respondents had an obligation to bargain about the decision. There is no indication that the decision here was motivated by a desire to reduce labor costs, a matter which the Court has found to be ''peculiarly suitable for resolution within the collective bargaining framework.''[18] Moreover, requiring bargaining over the integration decision would place a significant burden on the Respondents because, as explained by Irwin, the integration process involved structural and operational changes designed to make the former Holly Farms transportation division operate like a common carrier.[19] Additionally, implementation of the integration decision required the expenditure of capital.[20] For these reasons, we find that the burden on the conduct of the business outweighs any benefit that might be gained from the Unions' participation in the decision and, therefore, that the September 12 integration decision was not a mandatory subject of bargaining. Accordingly, we reverse the judge's finding that the Respondents violated Section 8(a)(5) and (1) by failing to bargain about the integration decision.

The Board has recognized, however, that employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain. *Litton Business Systems*, 286 NLRB 817, 819–821 (1987), enfd. in pertinent part 893 F.2d 1128 (9th Cir. 1990) (citing *First National Maintenance*, above).[21] Here, we find that the Respondents had an obligation to bargain over the decision to offer Holly Farms drivers employment as Tyson employees under Tyson terms and conditions of employment as an effect of the integration decision. In so finding, we note that the terms at which the Holly Farms drivers were offered employment were not an inevitable consequence of the functional integration of the transportation departments, but were only ''one of a number of responses to changed circumstances.'' *Litton*, 286 NLRB at 820. The Respondents were therefore required to give the Unions notice and an opportunity to bargain about the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers.

An examination of the correspondence exchanged between the Unions and the Respondents in September and October makes clear that the Unions repeatedly requested bargaining about both the integration decision and its effects, and requested certain information, including the merger agreement, which they contended was necessary for effective bargaining. The Respondents maintained throughout that Tyson had no bargaining obligation with respect to the Unions because the bargaining unit was no longer appropriate. Respondent Holly Farms indicated a willingness to bargain about the ''impact'' of the integration decision until such time as integration was complete, but asserted the Respondents' right to make the September 12 unilateral changes in terms and conditions of employment as part of the integration decision and indicated that those changes would not be rescinded.

The Respondents also refused to provide the requested information, contending that the Unions did not demonstrate its relevance to effects bargaining.[22] Under the circumstances, including our finding that Respondent Tyson was obligated to bargain as a successor employer as of July 18, we find that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain about the September 12 offer of employment to the Holly Farms unit employees as an effect of the integration decision. We further find that the Respondents unlawfully conditioned employment on the acceptance of Tyson terms and conditions of employment, thereby discharging 47 employees in viola-

[18] See the Court's discussion in *First National Maintenance*, id. at 680, of the application of a balancing test in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 213–214 (1964).

[19] For example, the former Holly Farms drivers, who had previously followed established routes, began to make multiple-leg trips in order to generate backhaul revenue.

[20] New central terminals, for example, were built in the eastern and western division of the former Holly Farms transportation department.

[21] In *Litton*, the Board found that an employer's decision to lay off employees was bargainable as an effect of a decision to transfer certain work and convert operations. See also *Paramount Poultry*, 294 NLRB 867, 869–870 (1989) (decisions to reduce the workweek and to lay off employees bargainable as effects of the decision to terminate part of product line and customer base).

[22] We agree with the judge, for the reasons stated in his decision, that the Respondents violated Sec. 8(a)(5) and (1) by refusing to provide the Unions with a complete copy of the merger agreement between Holly Farms and Tyson.

tion of Section 8(a)(5) and (1). See *Tuskegee Area Transportation System*, 308 NLRB 251, 252 (1992).[23]

We have found that Respondent Tyson became a successor of Respondent Holly Farms on July 18, and that the Respondents had an obligation to bargain about the September 12 offer of employment to the Holly Farms employees as effects of the integration decision. In so finding, we reject the Respondents' contention that Respondent Tyson had no obligation to bargain with the Unions because the unit employees were completely assimilated into the larger Tyson transportation work force, and the bargaining unit ceased to be appropriate. We adopt the judge's conclusions that the bargaining unit did not lose its separate identity under either an accretion analysis, or under the Respondents' related contention that the functional integration of the transportation departments constituted an ''unusual circumstance'' that would justify the withdrawal of recognition during the certification year, but we do so only for the following reasons.

First, the Board has found that in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred. *Northland Hub, Inc*., 304 NLRB 665 (1991). In this case, the judge found, and we agree, that the Respondents withdrew recognition on September 12 when they announced the plans for integration and stated that upon such integration the bargaining unit would cease to exist. Significantly, Tyson Vice President Irwin admitted that, as of that date, there was no detailed plan for the integration of the transportation departments. When questioned as to what was actually done after the September 12 meeting with the Unions ''by way of combining these operations,'' Irwin responded, ''We drafted out a rough outline of what we would do to implement and some timeframes that we felt like that we could get this integration process put in place by.'' Under the circumstances here, where at the time of the withdrawal of recognition there was no integration of operations or even detailed plans for implementation of the integration, we find that the Respondents are not entitled to rely on Tyson's future plans for the Holly Farms transportation department to justify refusing to bargain with the Unions. See also *Phil Wall & Sons Distributing*, above; *EPE, Inc*., 284 NLRB 191, 199 fn. 9 (1987), enfd. in pertinent part 845 F.2d 483 (4th Cir. 1988).[24]

Second, as found by the judge, many of the factors relied on by the Respondents to support their contention that the bargaining unit no longer remained appropriate were unlawful unilateral changes.[25] See *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987), enfg. in pertinent part 279 NLRB 1184 (1986). Finally, our finding that the Respondents' withdrawal of recognition from the Unions was not justified is further supported by the fact that the unlawful changes occurred during the certification year.

Although we have found that the Respondents were obligated to bargain with the Unions about the offer of employment to the Holly Farms employees under Tyson terms and conditions of employment as effects of the nonmandatory integration decision, we find merit in the Respondents' contention that its announcement to employees that the Holly Farms Retirement Plan would be terminated 2 years after the Tyson acquisition was not unlawful.[26] Section 7.02 of the Holly Farms Retirement Plan, which we have accepted into evidence, provides in pertinent part, ''Although it is expected that the Plan will be continued indefinitely, each Employer reserves the right to at any time terminate the Plan by action of its board of directors and to discontinue all contributions hereunder.'' In *St. Marys Foundry Co*., 284 NLRB 221 at 231 and 233 (1987), enfd. 860 F.2d 679 (6th Cir. 1988), the Board

[23] In finding that the Respondents unlawfully conditioned employment, Members Devaney and Oviatt do not adopt the judge's finding that the 47 employees were constructively discharged. See *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976).

Chairman Stephens, unlike his colleagues, agrees with the judge that the employees were constructively discharged. He does not rely, however, on those constructive discharge cases cited by the judge (exemplified by *Mfg. Services*, 295 NLRB 254 (1989)), in which the theory is that an employer intentionally sought, out of discriminatory motives, to rid itself of an employee through the imposition of working conditions so difficult or unpleasant as to induce the employee to quit. Id. at 255 and cases there cited. Instead, Chairman Stephens relies on another line of cases finding constructive discharges on the ground that the employees in question quit because the employer had presented them with a choice between quitting or remaining employed under terms and conditions of employment established in derogation of their statutory rights. See, e.g., *Control Services*, 303 NLRB 481, 485 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992); *White-Evans Service Co*., 285 NLRB 81, 81–82 (1987).

We adopt the judge's finding that the Respondents also violated Sec. 8(a)(5) and (1) by dealing directly with unit employees concerning terms and conditions of employment. We find it unnecessary, however, to pass on the Respondents' bargaining obligations with respect to the August 8 partial integration decision, which was rescinded shortly thereafter. We note that, in any event, there were no bargainable effects of this decision, which was never implemented.

[24] Concerning the Respondents' reliance on the integration of Holly Farms' and Tyson's operations, we note that such integration does not necessarily—and does not here—negate the separate identity of the drivers' and yardmen's unit. See *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988) (companywide unit in trucking operation not the only appropriate unit even though wages and fringe benefits were both uniform and centrally determined and a single employee manual/driver handbook applied to all employees).

[25] Specifically, the judge cited as examples the unilateral changes in pay, work locations, schedules, and other terms of employment resulting from the integration. We have found that the Respondents had an obligation to bargain over these subjects as effects of the integration decision.

[26] The judge found that the employees were notified of this change on September 12, and again in December correspondence and at a January 1990 meeting.

relied on a similar clause, by which the employer reserved the right of termination under the terms of the pension plan, to find that the successor employer's cessation of the plan did not violate the Act. We further note that here, there was no collective-bargaining agreement in effect between Respondent Holly Farms and the Unions that could restrict the Respondents' right to terminate the plan. Accordingly, we reverse the judge and find that the Respondents did not violate Section 8(a)(5) and (1) by unilaterally changing, with the intent of terminating in 2 years, the Holly Farms Retirement Plan.

4. The judge found that on March 31, Local 391 achieved majority status in the live haul unit. He further found that the Respondents' unfair labor practices justified a *Gissel*[27] bargaining order with respect to that unit. In so finding, the judge discussed the unfair labor practices committed by the Respondents against the live haul employees. Citing *J. P. Stevens, Inc.*, 239 NLRB 738, 770 (1978), modified 623 F.2d 322 (4th Cir. 1980), he also relied on the Respondents' unlawful conduct directed toward nonunit employees, including drivers and production employees, to justify imposing a bargaining order in the live haul unit. The Respondents dispute the judge's finding of majority status; they contend that even if Local 391 achieved majority status, a bargaining order is not warranted here; and maintain that the judge's reliance on unfair labor practices affecting nonunit employees was misplaced. We adopt the judge's imposition of a bargaining order, but with the following modifications.[28]

A showing of majority status is a prerequisite to the imposition of a *Gissel* bargaining order. *Philips Industries*, 295 NLRB 717, 718 fn. 10 (1989). In support of their position that the Union did not achieve majority status, the Respondents contend that 6 of the 103 authorization cards submitted by the General Counsel should not be counted because of deficiencies concerning the dates and/or signatures that appear on the cards. The Respondents further contend that two additional cards should not be counted because they were signed by persons who were not part of the unit during the relevant period of time. As will be discussed, we agree with the judge that the Union achieved majority status in the live haul unit, but we find that such status was achieved as of June 28, and not March 31.

The parties stipulated that on March 31, 1989, there were 103 authorization cards and that the cards were authentic as to signatures and dates. The parties also stipulated that there were 201 unit employees at that time. The judge relied on the stipulation to find that on March 31, a majority of unit employees had authorized the Union to represent them by signing cards. We find, in agreement with the Respondents, that the judge erred in interpreting the stipulation as including majority status. Here, the plain meaning of the stipulation is that the parties agreed to the *authenticity* of the cards, i.e., that the cards were executed by those persons whose signatures appear on them and were signed on the dates indicated. See *Zero Corp.*, 262 NLRB 495, 499 (1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983); *Ona Corp. v. NLRB*, 729 F.2d 713 (11th Cir. 1984).[29]

The Respondents maintain in their exceptions that Michael Sturgill's 1988 card[30] should not be counted because his first name is misspelled on the signature line and is printed, and because the handwriting on the signature line is not the same as the handwriting on the remainder of Sturgill's two cards. The Respondents also maintain that the name on a card purportedly signed by Dennis Johnson is misspelled, and that another card displaying the name ''Arnold Clonch'' is signed by ''Arnold Stanley,'' and, therefore, that these two cards should also be excluded. We find, however, that having stipulated to the authenticity of the cards, the Respondents cannot now question the authenticity of signatures that appear on them.[31] The Board has held that it is generally accepted that a stipulation is conclusive on the party making it, and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it. *Kroger Co.*, 211 NLRB 363, 364 (1974). Noting that the parties' stipulation is not ambiguous, we decline to discount any of the authorization cards on the basis of questions about their authenticity.

The Respondents next contend that three cards should not be counted because they were signed *after* the stipulated date of March 31: Timothy Williams' card dated June 26, 1989, Clifton Johnson's card dated June 28, 1989, and Michael Sturgill's card dated July 16, 1989. The Respondents also maintain that Sturgill's February 7, 1988 card should not be counted because it was signed before the Union's organizing

[27] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[28] The election was held in the live haul unit on July 27. We adopt the judge's recommendation that the election should be set aside because Respondent Holly Farms engaged in unlawful conduct that was alleged to be objectionable and that interfered with free choice in the election process.

[29] Our finding, based on the unambiguous language of the stipulation, is further supported by statements made at the hearing by the Respondents' counsel at the time the parties entered into the stipulation. He stated, ''I mean whatever the cards say when you put them in, they say. I agree that whatever is the date on the card and the signature on the card is authentic.''

[30] The 103 cards submitted by the General Counsel include two cards for Michael Sturgill (reflecting the same social security number), one dated February 7, 1988, and one dated July 16, 1989.

[31] See *Zero Corp.*, above, in which the authorization cards were authenticated at the hearing by a handwriting expert without objection from the respondent. The respondent later contended in its brief to the judge that many of the cards were invalid because the dates were not filled in by the signers. The Board found, however, that the respondent, having reexamined the cards, could not question their authenticity for the first time in its posthearing brief.

campaign began in December 1988. Where, as here, a bargaining order is based on violations of Section 8(a)(1) rather than on a demand for bargaining, bargaining is ordered as of the earliest possible date when both of the following conditions are met: the respondent has commenced its unlawful conduct *and* the union has attained majority status. See *Multimatic Products*, 288 NLRB 1279, 1321 fn. 278 (1988); *Ultra-Sonic De-Burring*, 233 NLRB 1060 fn. 1 (1977), enfd. 593 F.2d 123 (9th Cir. 1979). Thus, in this case, despite the stipulated date of March 31, which the judge interpreted as the date of majority status, he ordered bargaining from April 3, which he found to be the date the Respondents commenced their course of unlawful conduct. Further, although the parties have stipulated to the authenticity of the dates that appear on the cards (i.e., that the cards were signed on the dates that appear on them), an examination of those dates for the purpose of determining when the Union attained majority status concerns a legal question—and *not* matters relating to authenticity—that is properly before the Board now. See *Burger King*, 258 NLRB 1293, 1300 (1981), enfd. mem. sub nom. *NLRB v. Greyhound Food Management*, 709 F.2d 1506 (6th Cir. 1983).

Examining the dates on the cited cards, we agree with the Respondents that Michael Sturgill's 1988 card should not be counted because it was not signed during the Union's organizing campaign. See *Fort Smith Outerwear*, 205 NLRB 592, 594 (1973), modified on other grounds 499 F.2d 223 (8th Cir. 1974).[32] Additionally, we find that the cards of Williams and Johnson and Sturgill's 1989 card should be counted toward majority status as of the dates that appear on them. Thus, after discounting Sturgill's 1988 card and counting Williams' card as of June 26 and Johnson's card as of June 28, we find that the Union attained a majority of 101 cards, in a unit of 201 employees, as of June 28.[33]

The Respondents also contend that the cards of two other employees should not be counted in determining majority status. According to the Respondents, Randy Nichols was terminated on May 3 and his card should not be used to determine majority status after that date. Additionally, they contend that the card signed by Harley J. Perry Jr. should not be counted because Perry had been employed as a guard since 1976, and therefore was not part of the unit. We have denied the Respondents' motion to reopen the record to admit evidence relevant to the employment status of Perry and Nichols. The Respondents attribute their failure to raise the majority status issue before the judge to the General Counsel's failure ''to reasonably ascertain the accuracy'' of the authorization cards before introducing them into evidence. However, as discussed, the Respondents at the hearing stipulated to the authenticity of the cards and raised no issues concerning their validity. We find that the Respondents' failure to realize the significance of the evidence at the time of the hearing, and to present evidence which was apparently readily available at that time, does not constitute the sort of extraordinary circumstances that would warrant reopening the record under Section 102.48(d)(1) of the Board's Rules and Regulations. See *Superior Fast Freight*, 275 NLRB 329 fn. 1 (1985).[34]

Having found that the Union attained majority status in the live haul unit as of June 28, we agree with the judge that a bargaining order is warranted. In determining whether a bargaining order is appropriate to protect employee sentiments and to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's practices. In weighing a violation's pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. *FJN Mfg.*, 305 NLRB 656, 657 (1991).

In finding a bargaining order appropriate here, we rely particularly on Respondent Holly Farms' unlawful grant of economic benefits to the live haul employees, conduct which was also emphasized by the judge. We have also adopted the judge's finding that following the Unions' certification in the drivers and yardmen unit, Live Haul Manager Lovette engaged in a pervasive pattern of unlawful interrogations, solicitations, and promises to remedy grievances among the live haul employees. The judge found that in response to concerns expressed by live haul employees about inadequate pay due to their 4-day workweek, Respondent Holly Farms increased their work hours beginning in May. Addressing the same employee concerns was the Respondents' July 2 wage increase, which we have found to be coercive. The solicitation of grievances and promises to remedy them and the grant of wage increases have a strong coercive effect on employee freedom of choice because they eliminate primary reasons for organization. *Montgomery Ward & Co.*, 288 NLRB 126, 129 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir. 1990). Additionally, wage increases in particular have been recognized as having a

[32] In *Fort Smith*, the Board found that the General Counsel did not meet his burden of proving that the card was signed on a date other than that appearing on its face (December 3, 1970), which was not during the organizational campaign that commenced on November 30, 1971.

[33] In making this finding, we note that the Respondents in fact state in their brief that ''the earliest possible date of the Union's majority status was June 28.''

[34] Moreover, noting that the Respondents contend that Perry was not a unit employee and that Nichols was not a unit employee after May 3, we find that even if their cards were not counted toward a determination of majority status, the Union would have attained a majority of 100 cards in a smaller unit of 199 employees by July 16, the date of Sturgill's second card.

potential long-lasting effect, not only because of their significance to employees, but also because the Board's traditional remedies do not require a respondent to withdraw benefits. *Color Tech Corp*., 286 NLRB 476, 477 (1987).[35] As the judge in this case discussed, because the increases regularly appear in paychecks, they are a continuing reminder that ''the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.'' *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964). Significantly, in terms of pervasiveness, the Respondents' wage increase affected all the unit employees.[36]

For these reasons, we find that the Respondents' unfair labor practices affecting the live haul employees had the tendency to undermine majority strength and impede the election processes, thereby rendering it unlikely that traditional remedies would erase the effects of the unlawful conduct and ensure the conduct of a fair election. *NLRB v. Gissel Packing Co*., above.

We further find, in agreement with the judge, that under the circumstances here, the Respondents' unfair labor practices directed against employees in other units provide further support for the issuance of a bargaining order in the live haul unit. The judge found, and we agree, that it is appropriate to consider these unfair labor practices for the following reasons: (1) the Respondents' conduct was concentrated and principally affected employees in the Wilkesboro complex where the live haul facilities were contiguous with the plants and, before the integration, were contiguous with the eastern division transportation department; (2) the Respondents' labor relations policies were centrally controlled and the September withdrawal of recognition from the Unions was overt and highly publicized; and (3) the Respondents did not try to conceal from the live haul employees their unlawful conduct affecting employees in other units, and in fact called some of that conduct to the attention of the live haul employees in order to discourage their union activities. Regarding the latter, the judge found that Vice President Lankford told live haul employees about the arrests of the drivers for engaging in union handbilling in the parking lots.[37]

As found by the judge, the unfair labor practices directed at nonunit employees included threats of closure and job loss by high level officials, as well as the unlawful discharge of four employees for engaging in prounion activities on nonworktime in nonwork areas. The Board has emphasized, with court approval, that threats of plant closure and discharge not only are ''hallmark'' violations, but are among the most flagrant of unfair labor practices. *Q-1 Motor Express*, 308 NLRB at 1268 (and cases cited therein). Further, the Respondents' unlawful 8(a)(5) conduct with respect to the drivers and yardmen unit following the Tyson purchase, including the unlawful withdrawal of recognition and imposition of Tyson terms and conditions of employment, were conspicuous and pervasive and positioned the Respondents to gain an advantage in the event of a new election.[38]

We also find, contrary to the Respondents' contention, that evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order and, even if considered, would not require a different result. See *F & R Meat Co*., 296 NLRB 759 (1989). Finally, we note that the Respondents have presented no evidence to support their contention that a bargaining order is not appropriate because there have been changes in management.[39]

Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondents' extensive and serious violations is slight and the holding of a fair rerun election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate as of June 28, the date by which we have found the Union attained majority status in the live haul unit.[40]

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[35] See also *Pembrook Management*, 296 NLRB 1226, 1228 (1989), in which the Board discussed cases in which bargaining orders were given based solely on the grant of wage increases in reaction to union organizing campaigns.

[36] We reject the Respondents' contention that the wage increase and workweek extension cannot be characterized as either serious or pervasive because they occurred after the March 27 dismissal of the representation petition in the live haul unit and at a time when Respondent Holly Farms believed that no election was pending in the live haul unit. Although conduct does not have to occur during the critical period to be relevant to a determination of whether a *Gissel* bargaining order is appropriate, we note that here the unlawful economic changes in fact occurred *after* the representation petition had been reinstated on April 28.

[37] We do not, however, rely on the judge's citation to *J. P. Stevens*, above, which we find to be factually distinguishable.

Cf. *Action Auto Stores*, 298 NLRB 875 (1990) (bargaining order given at each of the nine stores involved in the election based on unfair labor practices at six of those stores, even in the absence of a finding that knowledge of the respondent's actions was disseminated).

[38] In view of the totality of the Respondents' unlawful conduct, which was both serious and pervasive, we reject the Respondents' reliance on the election tally to support its contention that a bargaining order is not warranted because the Union's majority status was not dissipated. Cf. *Eddyleon Chocolate Co*., 301 NLRB 887 (1991).

[39] As indicated, we have denied the Respondents' motion to reopen the record to present evidence regarding employee turnover and a change in management of the live haul employees.

[40] Among the unlawful unilateral changes found by the judge was the Respondents' October 1 change in the absentee policy for live haul employees. The Respondents contend that although the judge set forth the facts relating to this allegation, he did not explicate the basis for his finding, appearing only in the Conclusions of Law, that this change was unlawful. Relying on our imposition of a bargaining order in the live haul unit, we find that the Respondents had an obligation to bargain with the Union before changing the absentee policy. We therefore find, in agreement with the judge, that the Re-

CONCLUSIONS OF LAW

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Tyson Foods, Inc., at all material times since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several liability to remedy Holly Farms' unfair labor practices.

3. Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long-distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long-distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Unions.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining, and disparately enforcing a rule which prohibits employees from distributing materials in nonwork areas on the Respondents' property during nonwork hours.

(h) Threatening to arrest their employees for distributing union materials in nonwork areas on the Respondents' property during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Promulgating, maintaining, and enforcing a rule which prohibited their employees from discussing wages with other employees.

(l) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the Unions as their bargaining representative.

(m) Repeatedly coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge if they should choose the Unions as their bargaining agent.

(p) Theatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not choose the Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in the scheduled representation election should they chose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman Jr., and Joseph Richardson.

(b) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome by the issuance of written warnings.

(c) Causing employees to be arrested for distributing union materials in nonwork areas on the Respondents' property during nonworktime.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9(a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

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spondents violated Sec. 8(a)(5) and (1) by unilaterally changing the policy.

7. At all times since March 24, 1989, the seven above-named Teamsters Local Unions (the Unions) have been, and are, the exclusive jointly certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to bargain about the September 12, 1989 offer of employment to the Holly Farms unit employees as an effect of the integration decision.

(b) Unlawfully conditioning employment on the acceptance of Tyson terms and conditions of employment, thereby discharging the following employees:

Earl Howell	Jerry Fisher
Fred Royal	R.J. Absher
Gene Harris	Clark McNeil
Danny Osborne	Earl Eller
Bill Ray Johnston	Jerry Blackburn
Dan Wingler	Kenneth Eller
Ray Kanupp	Sam Badgett
George Glass	Robert Crook
Bryant Welborn	Harden Branscome
James Spicer	Bill St. John
Mike Hamby	Mike Dancy
Mike Maudlin	Thomas Roope
Thomas Alexander	David Laney
Larry Eldreth	Zane Filipic
Donnie McClary	Denny Patrick
David Anderson	Romey Nelson
Butch Miller	David or Danny Howell
Gene Hester	Jerry Mealy
James Sparks	Patrick Owens
George Barber	Donnie Blackburn
Teddy Ray Hayes	Jerry Miller
Steve Eller	Michael Simmons
Curtis Eastridge	Mike Staley
Donald Dollar	

(c) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours, and other terms and conditions of employment.

(d) Unilaterally changing the wages, hours, work locations, and other terms and conditions of employees in the above-described unit.

(e) Withdrawing recognition from the Unions as the exclusive collective-bargaining representative of the employees in the above-described unit and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining representative of the unit employees.

(f) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc. and Holly Farms Corporation.

(g) Unilaterally changing the absentee policy as to when live haul employees must report their absences to the Respondents to avoid discharge.

9. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the Respondents' above-described unfair labor practices.

10. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

11. On or about June 28, 1989, Local Union No. 391, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union), separately represented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

12. By virtue of its unfair labor practices, the Respondents have attempted to undermine the Union's majority status and have precluded the holding of a fair rerun election, thereby making a bargaining order an appropriate remedy.

13. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

14. The Respondents' unlawful conduct interfered with the representation election held on July 27, 1989, in Case 11–RC–5583.

AMENDED REMEDY

1. Substitute the following for line 16 of paragraph 3 of the judge's remedy:

''to those employees sums equal to the difference between what they would have earned from mileage.''

2. In paragraphs 4 and 6 of the judge's remedy, change all references to ''constructive discharges'' to ''discharges.''

3. Delete paragraph 8 of the judge's remedy.

4. Substitute the following for paragraph 9 of the judge's remedy:

''Having found that the Respondents unlawfully changed the absentee policy with respect to live haul employees, the Respondents should, on request, rescind the unilaterally changed policy and bargain with Local 391 regarding absentee call-in requirements.''

ORDER

The National Labor Relations Board orders that the Respondents, Holly Farms Corporation and Tyson Foods, Inc., Wilkesboro, Monroe, and Roaring River, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center, Seguin, and Carthage, Texas, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening their employees that the departments in which they are employed will be closed if they should choose Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Unions), or any other labor organization, as their bargaining agent.

(b) Threatening their employees that, whether or not they choose the Unions as their bargaining agent, the Respondents will take away their jobs by selling the trucks they drive and by subcontracting their hauling work.

(c) Soliciting grievances from their employees and promising, directly or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Informing their employees that it would be futile for them to join or support the Unions, or any other labor organization.

(e) Threatening their employees with unspecified reprisals for having supported the Unions.

(f) Advising their employees to abandon the Unions in favor of forming a committee to negotiate with the Respondents with respect to wages, hours, and other terms and conditions of employment.

(g) Establishing, maintaining, and disparately enforcing a rule which prohibits their employees from distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(h) Respectively, threatening their employees with arrest and causing their employees to be arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Establishing, maintaining, and enforcing a rule which prohibits their employees from discussing their pay rates with each other.

(l) Retaliating against their employees by assigning them less mileage, and thereby lessening earnings, because they chose the Unions as their bargaining representative.

(m) Coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge should they choose the Unions as their collective-bargaining agent.

(p) Threatening their employees that other employees who were active for Local 391 would be discharged should the employees not choose that Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in a scheduled representation election should they choose a union as their bargaining agent.

(r) Discouraging membership in a labor organization by discharging employees, issuing written warnings to their employees for engaging in union activities, and discriminatorily granting their employees special pay raises.

(s) Conditioning employment on the acceptance of unlawful unilaterally imposed terms and conditions of employment, thereby discharging employees.

(t) Refusing to recognize and, on request, to bargain with the above-named Unions as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

(u) Refusing to bargain with the Unions about offering employment to unit employees under changed terms and conditions of employment as an effect of the integration decision.

(v) Refusing to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

(w) Unilaterally changing the absence policy for live haul employees.

(x) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain, on request, with Teamsters Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988 as the exclusive collective-bargaining representative of their employees in the drivers and yardmen bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer Patricia Barker, Raymond K. Huffman Jr., Alvin Bouchelle, Joseph Richardson, and the 47 employees whose employment was unlawfully conditioned, immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits resulting from their unlawful action against them in the manner set forth in the remedy section of the judge's decision, as amended. The 47 discharged employees entitled to this remedy are:

Earl Howell	Jerry Fisher
Fred Royal	R.J. Absher
Gene Harris	Clark McNeil
Danny Osborne	Earl Eller
Bill Ray Johnston	Jerry Blackburn
Dan Wingler	Kenneth Eller
Ray Kanupp	Sam Badgett
George Glass	Robert Crook
Bryant Welborn	Harden Branscome
James Spicer	Bill St. John
Mike Hamby	Mike Dancy
Mike Maudlin	Thomas Roope
Thomas Alexander	David Laney
Larry Eldreth	Zane Filipic
Donnie McClary	Denny Patrick
David Anderson	Romey Nelson
Butch Miller	David or Danny Howell
Gene Hester	Jerry Mealy
James Sparks	Patrick Owens
George Barber	Donnie Blackburn
Teddy Ray Hayes	Jerry Miller
Steve Eller	Michael Simmons
Curtis Eastridge	Mike Staley
Donald Dollar	

(c) Rescind the written warnings previously given to James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome, and remove from their records any reference to the above discharges, written warnings, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and notify each affected employee, in writing, that this has been done and that such discharges, written warnings, and/or discipline shall not be used against them in any way.

(d) On request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting employees in the drivers and yardmen unit, retroactively to September 22, 1989, or whenever such changes became effective, except that employees need not be relocated, and make the unit employees whole, with interest, for any losses sustained due to the Respondents' unlawfully imposed changes in wage rates, hours of work, road fees, job benefits, and other terms and conditions of employment, since the effective dates of these unlawful changes, in the manner set forth in the remedy section of the judge's decision, as amended.

(e) Recognize and bargain, on request, with Local 391 as the exclusive collective-bargaining representative of the employees in the following unit appropriate for bargaining with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

(f) On request, rescind the unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must communicate their absences to the Respondents within 2 days instead of 3 days, as before, and bargain with Local 391 concerning absentee call-in requirements.

(g) On unconditional application to return, offer to any employee who participated in the strike commencing October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989. Further, make whole such employees, with interest, for any loss of earnings suffered by reason of the Respondents' refusal, if any, to reinstate them in the manner set forth in the remedy section of the judge's decision, as amended.

(h) On request, furnish the Unions a complete copy of the merger agreement between Holly Farms Corporation and Tyson Foods, Inc.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at all their various facilities including those in Wilkesboro, Roaring River, and Monroe, North Carolina; Harrisonburg, Temperanceville, and Glen Allen, Virginia; and Carthage, Seguin, and Center, Texas, copies of the attached notice marked ''Appendix.''[41] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

MEMBER OVIATT, dissenting in part.

I agree with my colleagues' findings and conclusions except in the following significant respect.

Consistent with my concurrence and partial dissent in *Camsco Produce Co*., 297 NLRB 905, 910 (1990), I find that the Respondents' live haul workers are agricultural laborers and are not covered by the Act.[1] I would thus dismiss all complaint allegations that allege violations with respect to live haul workers.

In *Camsco*, to determine whether farm workers were employees under the Act or ''agricultural laborers'' excluded by Congress from the coverage of the Act, I applied a rule of substantiality and regularity. That is, farm workers, to be employees under the Act, must regularly handle or process a substantial amount of farm products grown by other than their own employer. Otherwise, they are agricultural laborers excluded from the coverage of the Act.

Here, the workers in issue catch chickens and deliver them to the Respondents' Wilkesboro processing plant. During 1989, apparently deemed by the parties to be a representative year, the Respondents processed approximately 96 million chickens at the Wilkesboro plant. The Respondents purchased only 575,000 of those chickens—i.e., less than 1 percent—from outside sources. Thus, of the chickens handled by the live haul workers, less than 1 percent were raised by employers other than the Respondents.

The Respondents surely process an insubstantial percentage of chickens from outside sources. Therefore, although the Respondents' live haul employees may regularly handle the chickens of other employers, they do not catch and transport a substantial number of chickens from employers other than their own.[2] The Board should find that the Respondents' live haul employees are agricultural laborers.

Further, as in my view these workers are excluded from the coverage of the Act, there is no basis for finding that the Respondents violated the Act in regard to them.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] I did not participate in the Board's decision in response to the Union's request for review of the Regional Director's decision in Case 11–RC–5583.

[2] In *Camsco*, the employer grew, harvested, and packed mushrooms. It obtained about 4 percent of its mushrooms from other growers—it grew the rest itself. I concluded that the 4 percent obtained from other growers was an insubstantial amount. Thus, I concluded that the farm workers who sorted, graded, and packed the employer's mushrooms were agricultural laborers excluded from the coverage of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively, on request, with Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL–CIO, as the exclusive joint bargaining representative of our employees in the following appropriate bargaining unit concerning wages, hours, and other terms and conditions of employment:

> All driver employees and yardmen employed by us who regularly are dispatched for outhauls through our terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at our facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office

clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that the departments in which you are employed will be closed should you choose the Unions, or any other labor organization, as your bargaining agent.

WE WILL NOT threaten that, whether or not you choose the Unions as your bargaining agent, we will take away your jobs by selling the trucks that you drive and by subcontracting your hauling work.

WE WILL NOT solicit grievances from you and promise, directly or by implication, to adjust them in order to induce you not to select the Unions as your bargaining agent.

WE WILL NOT inform you that it would be futile to join or support the Unions, or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals for having supported the Unions, or any other labor organization.

WE WILL NOT advise you to stop supporting the Unions in favor of forming a committee to negotiate with our management with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT establish, maintain, and disparately enforce a rule which prohibits you from distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with arrest and WE WILL NOT cause you to be arrested for distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT inform you that other employees have been arrested for distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with discharge should you distribute union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT establish, maintain, and enforce a rule which prohibits you from discussing your pay rates with other employees.

WE WILL NOT threaten to retaliate against you by assigning you less mileage, thereby lessening your earnings, because you selected the Unions as your bargaining agent.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies, and desires.

WE WILL NOT threaten you with retaliation for wearing union hats.

WE WILL NOT threaten discharge should you choose the Unions as your collective-bargaining representative.

WE WILL NOT threaten that employees who were active for Local 391 will be discharged for their union activities should the employees not choose the Union as their bargaining agent.

WE WILL NOT threaten that our management will know how you voted in a scheduled representation election should you choose Local 391, or any other labor organization, to be your bargaining agent.

WE WILL NOT discourage membership in a labor organization by discharging you, issuing written warnings to you for engaging in union activities, or discriminatorily granting you pay raises.

WE WILL NOT condition employment on the acceptance of unlawful unilaterally imposed terms and conditions of employment, thereby discharging employees.

WE WILL NOT refuse to bargain with the Unions about offering employment to unit employees under changed terms and conditions of employment as an effect of the integration decison.

WE WILL NOT refuse to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

WE WILL NOT unilaterally change the absentee policy for live haul employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Teamsters Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988 as the exclusive collective-bargaining representative of our employees in the drivers and yardmen unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request, recognize and bargain with Local 391 as the exclusive collective-bargaining representative of our employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at our processing facilities located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at our facility located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL offer Patricia Barker, Raymond K. Huffman Jr., Alvin Bouchelle, and Joseph Richardson, whom we have unlawfully discharged, and the 47 employees named below, whose employment was unlawfully conditioned, reinstatement to their former positions and, if such positions no longer exist, to substan-

tially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of our conduct against them, less any net interim earnings, plus interest. The 47 employees entitled to this remedy are:

Earl Howell	Jerry Fisher
Fred Royal	R.J. Absher
Gene Harris	Clark McNeil
Danny Osborne	Earl Eller
Bill Ray Johnston	Jerry Blackburn
Dan Wingler	Kenneth Eller
Ray Kanupp	Sam Badgett
George Glass	Robert Crook
Bryant Welborn	Harden Branscome
James Spicer	Bill St. John
Mike Hamby	Mike Dancy
Mike Maudlin	Thomas Roope
Thomas Alexander	David Laney
Larry Eldreth	Zane Filipic
Donnie McClary	Denny Patrick
David Anderson	Romey Nelson
Butch Miller	David or Danny Howell
Gene Hester	Jerry Mealy
James Sparks	Patrick Owens
George Barber	Donnie Blackburn
Teddy Ray Hayes	Jerry Miller
Steve Eller	Michael Simmons
Curtis Eastridge	Mike Staley
Donald Dollar	

WE WILL rescind the discriminatory written warnings previously given to our employees, James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome.

WE WILL remove from our files any reference to the above discharges, written disciplinary notices, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and WE WILL notify the affected employees in writing that this has been done, and that we will not use the evidence removed against them in any way.

WE WILL, on request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting our employees in the drivers and yardmen unit, retroactively to September 22, 1989, or to when such changes became effective, except that employees need not be relocated, and WE WILL make our employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wage rates, road fees, benefits plans, and other terms and conditions of employment, since the effective dates of these unlawful changes.

WE WILL, on request, furnish the Unions, in timely fashion, a copy of the merger agreement between Tyson Foods, Inc. and Holly Farms Corporation.

WE WILL, on request, rescind our unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must call us to report absences within 2 days instead of 3 days, as before, and WE WILL bargain with Local 391 concerning absentee call-in requirements.

WE WILL, on unconditional application to return, offer to any employee who participated in the strike that began on October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989, and WE WILL make such employee whole, with interest, for any loss of earnings suffered by reason of our refusal, if any, to provide reinstatement.

HOLLY FARMS CORPORATION AND ITS SUCCESSOR, TYSON FOODS, INC.

Jasper C. Brown Jr. and *Michael W. Jeannette, Esqs.*, for the General Counsel.

Jesse S. Hogg and *James M. Blue, Esqs. (Hogg, Allen, Norton & Blue, P.A.)*, of Coral Gables and Tampa, Florida, and *William C. Warden Jr., Esq. (McElwee, Cannon & Warden)*, of North Wilkesboro, North Carolina, for the Respondents.

J. David James and *Bryan Lessley, Esqs. (Smith, Patterson, Follin, Curtis, James Harkavy & Lawrence)*, of Greensboro, North Carolina, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. These consolidated cases[1] were heard in Wilkesboro and North Wilkesboro, North Carolina, on complaints issued pursuant to charges filed jointly by Chauffeurs, Teamsters and Helpers Local Unions No. 29, 71, 355, 391, 592, 567, and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (collectively called the Unions) and separately by Teamsters Local Union No. 391 (Local 391 or the Union).[2] The

[1] The caption appears as amended, sua sponte.

[2] All dates hereinafter are within 1989 unless otherwise stated. The relevant docket entries are as follows: The original, amended, and second amended charges in Case 11–CA–13267 were filed by Local 391 on April 5, 11, and 18, respectively. The charge, amended charge, and second and third amended charges in Case 11–CA–13184 were jointly filed by the Unions on February 8, 16, October 2 and 11, respectively. The charge, amended charge, and second amended charge in Case 11–CA–13487 were filed by Local 391 on August 25, 31, and October 2, respectively. The charge and amended charges in Case 11–CA–13520 were filed by the Unions on September 15 and October 24. The charge in Case 11–CA–13619 was filed

Continued

consolidated complaints allege that Holly Farms Corporation (Holly Farms) violated Section 8(a)(1) and of the National Labor Relations Act (the Act) prior to the July 18 purchase of that Company by Tyson Foods, Inc. (Tyson) and since that date, both Tyson and Holly Farms (collective]y the Respondents), have acted in violation of Section 8(a)(1), (3), and (5) of the Act. In this regard, the General Counsel alleges that Tyson, since the July takeover, has been Holly Farms' successor and has succeeded to the asserted predecessor's bargaining obligation with the Unions, as described below. The General Counsel argues that the Respondents should be required to bargain with respect to two bargaining units.

The first such unit (the drivers-yardmen unit) was Board-certified on March 24 and includes:

> All driver employees and yardmen at the Respondents' Wilkesboro, North Carolina; Glen Allen (Richmond), Harrisonburg and Temperanceville, Virginia; and Center and Sequin, Texas, facilities; excluding all office clerical employees, and guards and supervisors, as defined in the Act.

As indicated by the above description, the drivers-yardmen unit was widespread so that geographic jurisdiction over the various unit facilities was distributed among the various Teamsters local unions here as follows:

Local Union No.	*Locations*
29	Harrisburg, VA
355	Temperanceville, VA
592	Glen Allen (Richmond), VA
71	Monroe, VA
391	Wilkesboro, NC
657	Seguin, TX
988	Center (Houston), TX

The other unit (the live haul unit), where there has been no Board certification but where a bargaining order has been requested, was found appropriate by the Board in Case 11–RC–5583. This unit includes:[3]

> All of the Employers' live haul (chicken catching crews) employees at the Employers' facilities in Wilkesboro, North Carolina, and the Employers' feed haul, feed mill and service center employees at the Employers' facility in Roaring River, North Carolina; excluding all office employees, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 391 in Case 11–RC–5583, a Supplemental Decision and Direction of Election issued by the Regional Director for Region 11 on June 20 and the Board's Decision on Review and Order, dated July 20, a representation election by secret ballot was conducted on July 27 in the above-described bargaining unit including live haul employees.[4] The tally of ballots served on the parties immediately following the election showed that of the approximately 198 eligible voters, 187 cast ballots, of which 92 were cast for the Union, 95 were cast against the Union, and 10 ballots were challenged. There were no void ballots, but the challenged ballots were sufficient in number to affect the results of the election. Local 391 filed timely objections to conduct affecting the results of the election. In their objections, the Union alleged that in the critical period before the election,[5] the Respondent-Employers, through their duly authorized representatives, interrogated their employees concerning their union activities and desires; threatened their employees with retaliation because of their union activities; promised their employees benefits to discourage their support of the Union; threatened their employees with discharge if they voted for the Union and if the Union won the election; campaigned in the polling area while the polls were open; gave their employees a wage increase shortly before the election; ordered their employees to cease union handbilling on their premises during nonwork time in nonwork locations; and threatened the arrest of their employees who had engaged in union handbilling during nonwork time in its nonwork locations.

On October 13, the Acting Regional Director issued his order directing that issues raised by the objections to the election and the determinative challenged ballots in Case 11–

by the Unions on November 28. The charges in Cases 11–CA–13267 and 11–CA–13619 were filed by Local 391. The charges and amended charges in the remaining aforesaid cases were filed jointly by Local Union Nos. 29, 71, 355, 391, 592, 657, and 988. The complaint in Case 11–CA–13627 and the order consolidating that matter with the consolidated complaint in Cases 11–CA–13184, 11–CA–13487, 11–CA–13520, were dated May 18 and October 13, respectively. The order consolidating the aforesaid cases with the hearing on objections and challenged ballots in Case 11–RC–5583 also issued on October 13. An amended consolidated complaint, issued November 8, and the amended complaint in Case 11–CA–13619, issued January 5, 1990, was consolidated into this proceeding at the hearing. The original complaint in Case 11–CA–13619 had issued on December 28. The complaint in Case 11–CA–13669, issued February 5, 1990, and consolidated into this proceeding at the hearing, later was severed and dismissed on the General Counsel's motion. The complaints were further amended at the hearing which was held during 25 days between November 27, 1989, and May 2, 1990.

[3] Unlike the above-described drivers-yardmen unit, where the seven Teamsters locals were joint]y certified, only Local 391 has sought to represent live haul unit employees.

[4] While the petition in Case 11–RC–5583, when filed, then accurately named Holly Farms as the sole employer, Tyson was in control by the time of the July 27 election.

[5] *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962), the Board defined the critical period before an election as the interval from the date of the filing of the petition to the time of the election. Conduct occurring during this period found to have interfered with the employees' freedom of choice at the polls may be grounds for setting aside the election. As will be discussed below, the Respondents challenge the interrupted application of this rule in the present case on the ground that certain allegations of the Respondents' unlawful conduct assertedly affecting the election results occurred during a hiatus period when the petition in Case 11–RC–5583 had been dismissed but had not yet been reinstated. The Respondents, because of this, contend that since no petition was pending when their disputed conduct was to have taken place, that the critical period before the election in this case should date from the reinstatement of the petition rather than from its initial filing, and that the disputed conduct should not be considered as affecting the election results. For reasons which will be detailed below, I find no merit to this argument and will find that, in Case 11–RC–5583, the critical period remained from February 16, when the petition originally was filed, to July 27, the election date.

RC–5583 be resolved in consolidated hearing with Cases 11–CA–13184, 11–CA–13267, 11–CA–13487, 11–CA–13520, and the subsequently consolidated Case 11–CA–13619.

Issues

1. Whether the Respondents by their managers, supervisors, and/or other authorized agents, independently violated Section 8(a)(1) of the Act by:

(a) Threatening their drivers-yardmen unit employees that the Respondents' trucking operations would be discontinued and the employees' hauling work contracted to outside firms if they selected the Unions as their collective-bargaining representative.

(b) Threatening their employees that their jobs would be lost if they chose the Unions as their collective-bargaining representative.

(c) Threatening their employees that it would be futile for them to select the Unions as their collective-bargaining agent.

(d) Threatening their employees that the Respondents' trucking operations would be reduced if they failed to accept a collective-bargaining contract that incorporated only existing terms and conditions of employment.

(e) Promulgating, maintaining, and enforcing a rule prohibiting their employees from discussing wages among themselves.

(f) Suggesting to employees that they form a committee to negotiate with management instead of selecting the Unions as their collective-bargaining representative.

(g) Threatening their employees with unspecified reprisals for engaging in union activities.

(h) Threatening their employees with retaliation if they selected the Unions as their collective-bargaining representative.

(i) Soliciting and promising to resolve their employees' grievances if they rejected the Unions and/or Local 391 as their collective-bargaining representative.

(j) Informing their employees that the Respondents maintained and enforced a no-solicitation rule prohibiting solicitation of any kind at any location on their premises.

(k) Interrogating employees as to their union activities, sympathies, and desires.

(l) Directing their employees to cease union handbilling in nonwork areas of the Respondents' premises during nonwork hours.

(m) Threatening and causing the arrest of their employees for engaging in union handbilling in nonwork areas of the Respondents' premises during nonwork time.

(n) Threatening employees that the Respondents' management would know how they voted in a scheduled representation election if they voted in favor of the Local 391.

(o) Discriminatorily prohibiting the posting of union literature on their bulletin boards.

(p) Prohibiting their employees from wearing union hats or insignia.

(q) Engaging in surveillance of their employees' union activities.

(r) Threatening employees with discharge because of their union activities.

2. Whether the Respondents discriminated against employees in violation of Section 8(a)(3) of the Act by:

(a) Discharging and refusing to reinstate employees Alvin Bouchelle, Raymond K. Huffman Jr., Patricia Barker, and Joseph Richardson because of their union activities.

(b) Issuing written disciplinary warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester, and James Phillip Church because of their union activities.

(c) Granting live haul unit employees pay increases shortly before a scheduled representation election to discourage union membership or support.

(d) Constructively discharging 47 long-distance drivers, members of the drivers-yardmen unit, because of their support for the Unions.

3. Whether the Respondents refused to bargain in good faith with the Unions in violation of Section 8(a)(5) of the Act by:

(a) Constructively discharging the above-noted 47 drivers who had refused to continue to work for the Respondents under unilaterally changed wages, hours, and other working conditions imposed by the Respondents without prior bargaining with the Unions.

(b) Withdrawing recognition from the Unions as bargaining representative of the employees in the drivers and yardmen unit during the year of the Union's certification year.

(c) Bypassing the Unions and dealing directly with unit employees concerning wages, hours, and other terms and conditions of employment.

(d) Refusing to furnish the Unions with a requested copy of the merger agreement between Tyson and Holly Farms, allegedly necessary to enable the Unions to meet their bargaining responsibilities.

(e) Unilaterally, without notice to or bargaining with the Union, changing the absenteeism call-in policy for employees in the live haul unit.

(f) Unilaterally, without notice to or bargaining with the Union, informing live haul employees that their pension plan would be terminated in 1-1/2 years.

4. Whether, in the context of the Respondents' unlawful conduct, the strike among the Respondents' drivers in the drivers-yardmen unit that began on October 1 was an unfair labor practice strike.

5. Whether, in the context of the above violations, the Respondents should be required to bargain with Local 391 with respect to live haul unit employees based on that Union's majority status as evidenced by signed union authorization cards.

6. In the alternative to issuing a bargaining order with respect to the live haul unit, whether the representation election in Case 11–RC–5583 should be set aside and a new election directed. Subordinate issues involved include:

(a) Whether Supervisor Commie Johnson interfered with the conduct of the election.

(b) Whether the determinative challenge to Tony L. Clark's ballot should be sustained.

All parties were given full opportunity to participate, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs.[6] Briefs filed by the General Counsel, the Charging Parties, and the Respondents have been carefully considered.

[6] The General Counsel's posthearing motion to correct their brief was unnecessary as the brief was complete as originally submitted.

On the entire record of these consolidated cases and my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Holly Farms, a Delaware corporation with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. During the 12 months prior to issuance of the consolidated complaints herein, representative periods, Respondent Holly Farms shipped from its Wilkesboro facility products valued in excess of $50,000 directly to points outside the State of North Carolina.

Respondent Tyson, a corporation licensed to do business in the State of North Carolina, with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. On about July 18, Tyson purchased a controlling interest in Respondent Holly Farms' stock and, since that date, has been engaged in the same business operations at the same location selling the same product to substantially the same customers and has as a majority of its employees, individuals who previously were employees of Holly Farms. Holly Farms Foods, Inc., and Holly Farms Food Services, Inc., are wholly owned subsidiaries of Holly Farms Corporation and Holly Farms Corporation is fully owned by Tyson.

The complaints allege, the answers, as amended at the hearing, admit, and I find, that Respondents Holly Farms and Tyson, respectively, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Unions herein are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background; Factual Overview*

The Respondent, Holly Farms, before July, was independently engaged in producing, processing, and shipping poultry and related products. While Holly Farms' principal and headquarters facility was in Wilkesboro, North Carolina, it had facilities at other points in the United States including Monroe, North Carolina; Glen Allen, Temperanceville, and Harrisonburg, Virginia; and in Center and Seguin, Texas. The North Carolina and Virginia facilities comprised the Holly Farms eastern division, while the Texas facilities constituted the Holly Farms western division. Holly Farms, either directly or through its subsidiaries, operated hatcheries, live haul operations, feed mills, feed haul operations, maintenance facilities, and poultry processing plants. Product was moved between facilities for further processing or to customers by drivers in the Holly Farms Transportation Department,[7] in which the above drivers-yardmen unit was included. As of September 12, Holly Farms, within the drivers-yardmen unit, employed 209 drivers, including extra-board, replacement drivers who did not have regular vehicle assignments, to operate about 170 tractors. Of these, around 120 were used for long-haul operations and the remainder for local traffic. At the time of the March 9, 10, and 11 election in the drivers-yardmen unit, 299 drivers and about 45 yardmen were employed. The great majority of these employees were in the eastern division.

The Respondents' Wilkesboro complex, where much, if not most of the relevant events occurred, was the nucleus of the Holly Farms operation before July 18 when Tyson assumed control. After Tyson took over, this complex continued to function for approximately the next 2 months under the same managers and supervisors and with the same employees in essentially unchanged fashion, except for certain changes in the transportation department, which will be detailed below.

The complex's north side was the location of the main processing plant where caged live chickens, brought in by live haul employees[8] on trucks from the grow-out farms, were weighed and ultimately moved into the processing plant, where fresh chicken products were prepared. This structure was bounded on the east, across a company street, by the food service plant, also known as Convenience Foods which, among other things, produced fast and frozen foods. A large employee parking lot lay to the west of the processing plant. This lot, in turn, was partially abutted on the south by the cooked products plant which, inter alia, prepared factory roasted chickens, sold as fully cooked. The scales, scales office, live haul office, broiler service, and live haul truck parking areas occupied the central areas of the complex. The transportation service buildings and parking areas for transportation department drivers were at the south and southeast corner, respectively. The complex, which employed about 2500 employees, also contained various plant cafeterias, a retail store, and additional company streets and parking areas.

The seven local unions in this matter began their organizing campaign on December 1, 1988, among the Holly Farms drivers and yardmen in that Company's above-referenced North Carolina, Virginia, and Texas facilities. Following an election on March 9, 10, and 11, the Unions were jointly certified on March 24 as bargaining representatives for employees in that unit in Case 11–RC–5571.

In late December 1988, Local 391 began its separate campaign to organize the Holly Farms live haul unit employees. On February 16, Local 391 filed the petition in Case 11–RC–5583 for a representation election among employees in a much larger unit than that ultimately approved by the Board. During this unit-sorting process, the Regional Director, on March 27, dismissed the petition in Case 11–RC–5583 on the ground that certain of the employees sought, including hatchery workers, were exempt from coverage under the Act as agricultural employees and because Local 391 had not expressed a desire to represent only those nonagricultural employees who were covered by the Act. However, in response

[7] Holly Farms had plants and terminals at all the aforesaid locations except Glen Allen (Richmond), Virginia, where it only had a terminal, and Harrisonburg, where there only was a plant.

[8] As will be discussed in greater detail, live haul employees consisted of chicken catchers and live haul drivers, who worked as members of crews. The chicken catchers would be transported to grow-out farms, where the chickens were raised, and manually caught and caged the chickens. Live haul drivers drove the chicken catchers to and from the farms and used flat bed trucks to move the caged chickens from the farms to the Wilkesboro complex scales and main plant receiving dock. After delivering each load to the complex, the live haul drivers would return to the farm for additional loads until the completion of their shifts.

to the Union's April 6 request for review, wherein it asserted that it would be willing to proceed to an election in any unit or units the Board found appropriate, the Regional Director, by Order, dated April 28, treated the request for review as a motion for reconsideration, reopened Case 11–RC–5583 and noticed the matter for hearing to obtain further evidence concerning the appropriate unit. On July 20, the Board granted Local 391's subsequent request for review of the Regional Director's determination that an election should be ordered for employees in two bargaining units, and directed that an election be conducted for the employees in the single above-described unit. The Union did not receive a majority of the ballots cast at the July 27 election. After the election, the Acting Regional Director sustained the challenges to the ballots of 6 of the 10 determinative ballots and overruled the challenges to 3 other ballots. Ultimately, this resulted in a tie vote and it became necessary to resolve the remaining determinative challenge—that of Tony L. Clark. Local 391 also filed timely objections to conduct affecting the results of the election. As noted, the issues concerning Clark's determinative challenged ballot and the election objections were consolidated herein.

Following the Union's March certification as representative for the Holly Farms drivers and yardmen, representatives of that Company and the Union participated in a series of negotiating sessions, starting in April, to try to reach agreement on a collective-bargaining agreement. Although it is agreed that these negotiations were conducted in good faith, by July, after about 12 sessions, the parties had not yet settled the terms of a contract. Also in July, as Tyson's takeover of Holly Farms became imminent, negotiations were suspended at Holly Farms' suggestion, pending clarification of the general situation.

When, on August 8, 9, and 10, contract negotiations for the drivers- yardmen unit resumed, Holly Farms' attorney, Jesse S. Hogg, continued as company spokesman, but with Tyson in control and its representatives present. At that time, the Respondents informed the Unions that drivers in what had been the Texas-based Holly Farms western division would be consolidated into the larger Tyson transportation system,[9] but that existing eastern transportation division would remain, except that it would be reduced by the layoff of 71 drivers and the removal of 47 tractors.

The parties met again in late August when the Respondents have the Unions copies of the Tyson wage and benefits plans, announcing their intention to apply them to the drivers unit employees.

At the last bargaining session, on September 12, the Respondents announced that they were rescinding their previously stated plans to lay off the 71 eastern division drivers and remove the 47 tractors. Instead of these reductions in personnel and equipment, the Respondent declared that they were going to also merge the eastern division, with the western division drivers into the Tyson transportation system; that the Respondents were immediately going to send letters to all drivers offering them employment with Tyson under the Tyson pay package and work rules;[10] that Holly Farms' job benefits would be continued for eastern division employees for 2 years in accordance with the Tyson/Holly Farms merger agreement;[11] that recognition was being withdrawn from the Unions; and that Holly Farms was prepared to bargain only with respect to the impact of these decisions to integrate, but not the decisions, themselves. The Unions protested and refused to negotiate impact.

On September 12, immediately after the meeting with the Unions, the Respondents sent letters to all Holly Farms drivers on Holly Farms stationery offering them employment as Tyson drivers under the terms and conditions of employment applicable to Tyson drivers, advising that those who did not accept the offer by September 22 would be deemed to have resigned. In the meantime, between September 12 and 22, members of the Respondents' management and supervision met with eastern division drivers at various facilities to describe the new proffered employment arrangement and to answer questions. After September 22, the Respondents also undertook the announced comprehensive integration of Holly Farms into the Tyson organization. This process essentially was completed before the time of the hearing and was described in detail in the record.

Of the more than 200 Holly Farms drivers who received the Respondents' September 12 letters offering employment under Tyson's terms, 47 drivers elected not to accept and were deemed to have quit. On October 1, the drivers began a strike against the Respondents.

The General Counsel and the Unions contend that the 47 drivers who refused to work for Tyson on and after the September 22 deadline under the unilaterally changed employment terms offered were constructively discharged in violation of Section 8(a)(1), (3), and (5) of the Act.

The parties have raised many issues and defenses in connection with this proceeding which will be topically addressed herein. Although not included in the foregoing factual outline, the General Counsel and Unions contend that before Tyson assumed control on July 18, Holly Farms had independently engaged in numerous violations of Section 8(a)(1) of the Act affecting drivers-yardmen and live haul unit employees, respectively, and also had violated Section 8(a)(3) by conduct which allegedly included the discharge of four plant employees and the issuance of written warnings to employees who had been active on the Unions' behalf. After Tyson's July 18 takeover, the Respondents, jointly and severally, are charged with further violations of Section 8(a)(1), (3), and (5) of the Act.[12] The foregoing factual outline, intended as overview, does not refer to all alleged violations of the Act.

Accordingly, the General Counsel argues that the strike that began on October 1 among the Respondents' long-distance drivers was an unfair labor practice strike caused by the Respondents' unlawful conduct. The General Counsel and Unions also assert that a bargaining order should issue requiring the Respondents to bargain with Local 391 with respect to the live haul unit on the ground that the Respondents' unlawful conduct had caused that Union to lose the majority it once had had held, as evidenced by union authoriza-

[9] At the time, Tyson's transportation department was about twice the size of that of Holly Farms.

[10] As will be discussed, the Tyson pay plan was less remunerative than was Holly Farms' and, under Tyson, drivers wold be required to spend more time away from home on longer runs.

[11] The Respondents refused to grant the Unions' request for a copy of the merger agreement.

[12] The General Counsel argues that Tyson, as successor, was responsible under the circumstances applicable here to remedy Holly Farms' alleged unfair labor practices.

tion cards, and as such conduct had rendered unlikely a fair, free election in that unit.

As stated, the Respondents' positions and defenses will be considered under relevant topics.

B. *Supervisory Issues*

1. General conclusions

The complaints herein allege that, before Tyson's July 18 takeover, 30 individuals were Holly Farms supervisors and agents. The same 30 also were alleged as the Respondents' supervisors and agents after July 18, except that 3 new names were added—those of Tyson's board chairman and chief executive officer, Don Tyson; and that Company's president and vice president, industrial relations, respectively, Leland Tollett and Howard Baird.

The Respondents have variously amended their answers to admit that, with the exception of John Sloop,[13] all persons respectively alleged to be Holly Farms' and Tyson's supervisors and agents exercised the authority and functions of supervisors and agents within the meaning of the Act.[14]

In accordance with the parties agreement, I find that the following individuals, who did not regularly or directly oversee live haul employees, were, at all material times, the Respondents' supervisors and agents, within the meaning of Section 2(11) and (13), respectively, of the Act: Blake Lovette, Curtis (Bob) Absher, David Hayes, David Fairchild, A. Gerald Lankford, Barbara Mathis, Marion McKinley (Al) Bare, Mary Barnes, Robert Pipes, Ronald Bell, David Eller, Jerry Blevins, Shelton Goddard, Gary Hamby, Murl Murphy, Luke Roten, Raymond Strong, Harold Eller,[15] Ted Roten, Tommy Felts, and Larry Church. Since Tyson's July 18 takeover, Don Tyson, Leland Tollett, and Howard Baird also have been the Respondents' supervisors and agents within the meaning of the Act.

The Respondents, as noted, have maintained their position that live haul employees are not employees within the meaning of Section 2(3) of the Act because exempt as agricultural workers and that, therefore, supervisors over live haul employees, correspondingly, are not supervisors under the Act, although exercising the requisite authority, because they do not supervise statutory employees. However, I am bound by the Board's decision in Case 11–RC–5583 that the live haul employees, in fact, are employees within the meaning of Section 2(3) of the Act. I, therefore, find that the following Respondents' live haul supervisors whom, the parties agree, otherwise have met the supervisory criteria of Section 2(11) of the Act, were the Respondents' supervisors and agents during the times relative to this proceeding: Ray Lovette, Commie Johnson, Dean Grimes, Donnie Jones, David Minton, and Sam Whittington.

The Respondents deny that Charles Robert (Bob) Sebastian, manager of the Respondents' Wilkes Hatcheries, is a supervisor while admitting that this authority would meet the criteria of Section 2(11) of the Act. Sebastian's status, which will be considered below in connection with the discussion of his alleged conduct, differs from that of the live haul supervisors, above, because unlike them, the Board, in Case 11–RC–5583, found that the hatchery workers who report to Sebastian were exempt as agricultural and excluded them from the unit.

Finally in this regard, it will be necessary to determine whether, as the Respondents assert, Joseph Richardson, group leader of the receiving dock employees at the Holly Farms food service plant in Wilkesboro, was a supervisor and agent within the meaning of the Act. The parties agree that Holly Farms had terminated Richardson for union activities before Tyson's arrival, and the principal issue concerning his termination is whether or not he was a statutory employee entitled to the protection of the Act when discharged.

2. The supervisory status of John Sloop

The parties have vigorously litigated John Sloop's alleged supervisory status as the complaint alleges that Sloop repeatedly engaged in conduct violative of the Act. The General Counsel and the Unions, contrary to the Respondents, assert that, prior to June 25, while Sloop still was Holly Farms' driver-coordinator at its eastern transportation division, Wilkesboro, when his asserted unlawful conduct was to have occurred, he was a supervisor within the meaning of the Act. The parties have stipulated that, after June 25, when promoted to Tyson's manager of safety and personnel, Wilkesboro, he became a statutory supervisor. Sloop had become driver-coordinator in 1979, having worked for Holly Farms as a long-distance driver since 1962.

As driver-coordinator, Sloop participated in the driver hiring process, did pallet control, handled fuel accounts, prepared routing books to be followed by Holly Farms' drivers in making deliveries, and performed other jobs. However, he did not dispatch drivers, handle their paperwork or, in the first instance, normally receive calls from drivers experiencing difficulties while on the road. Such calls were made to the dispatcher.

Sloop testified that under hiring procedures adopted in 1987,[16] a committee scoring process was established to evaluate driver applicants. Under this method, David Hayes, Holly Farms' vice president, transportation, would inform Sloop when it was necessary to hire a certain number of drivers and direct him to ''pull'' filed applications. Sloop usually took three times as many applications from the Company's files as there were vacancies to be filled and, after initially screening the applications to remove candidates with bad driving records or who otherwise appeared unsuitable, Sloop would give them to Hayes for further review. A committee consisting of Hayes; Wilkesboro Safety Director

[13] While denying that Sloop was a supervisor before September 25, when his alleged unlawful activities were to have occurred, the Respondents admit that, since that date, Sloop has been their supervisor and agent within the meaning of the Act. Sloop's pre-September 25 status will be considered below.

[14] In agreeing to supervisory authority, the Respondents do not admit the accuracy of the respective job titles as alleged in the complaint. These will he provided as applicable.

[15] Although a substantial number of persons referred to in this proceeding share like surnames, family relationships are not germane.

[16] Sloop was included in group of company supervisors to receive a May 27, 1986, memorandum from David Hayes, vice president, Holly Farms transportation division, requesting review of the proposed revisions to the driver application policy.

David Granger; Outhaul Manager Barry Wood;[17] head dispatcher, Wilkesboro, Curtis (Bob) Absher;[18] and Sloop, then rated the individual applicants. In doing so, the committee members afforded each candidate weighted points for a series of factors including, but not limited to, over-the-road driving experience, refrigerated trailer experience, safety traffic violations, education, previous employment and attendance, personality, and appearance. The committee voted a score for each which was recorded by Hayes. The applicants with the highest scores were selected in descending order for the available vacancies. With tie votes, Hayes decided who would be hired. Sloop participated as a full member of this committee, all of whose other members were managerial personnel and/or supervisors within the meaning of the Act, and his vote counted equally with those of the others.[19]

After the committee had evaluated various job applicants, it was Sloop's function to call in those who had scored the highest and steer them through further processing. He would send the potentially successful applicants to the first aid department for initial physical examination by the company nurse and then would give them road tests.[20] Sloop had the test forms typed indicating that the road tests had been given and his signature certified that applicants had passed. In grading road tests, driver-applicants either passed or failed. Sloop's road test evaluations did not recommend whether the applicants be hired and, in 10 years, only two applicants had failed to pass. Nonetheless, no driver could be hired without having been successful on the road test.

After the road test, Sloop would send driver applicants for final physical examination by the company physician and then to the safety director to be given U.S. Department of Transportation (DOT) tests and company orientation. When the driver-hopefuls returned from the safety department, Sloop would send them to Vice President Haves for interview. It was Hayes who told the successful candidates that they were hired. Sloop then would issue to the new drivers route directories, prepared by himself; a cargo lock; a credit card and a list of telephone numbers, before turning them over to the dispatchers. This ended Sloop's role in the hiring process.

Sloop attended managerial meetings on an average of every 2 or 3 months when invited because an area of his responsibility, such as pallet control or routing, was to be discussed.

From February until the July Tyson takeover, Sloop also was engaged in pallet control, which principally consisted of tracking the low wooden platforms on which loads were placed and on which all of Holly Farms' products were moved. Sloop would try to retrieve pallets that drivers did not bring back from deliveries. This required returning the receipts for the pallets to the customers who had issued them—done by mail or by sending the receipts with drivers. Sloop, however, did not directly send drivers to pick up company-owned pallets but would have the receipts to the dispatchers requesting that they to have the drivers do so.[21] It was not mandatory that drivers return pallets and, to Sloop's knowledge, no driver ever was disciplined for losing pallets or charged for a pallet shortage. Sloop never took action against any driver who failed to obtain pallets owed to Holly Farms.

Sloop's files relating to pallets, fuel accounts, and drivers' road violations were stored in his 8 by 11 foot office furnished with a desk, filing cabinet, telephone and calculator. He did not have a secretary.

With regard to fuel control, Sloop, based on his prior 17 years' experience as a company driver, but principally on information obtained from questioning drivers, prepared a list of fuel stops for the drivers, revising this list during each year. Sloop also gave drivers a credit card widely accepted in the trucking industry to be used for fuel purchases.

Drivers testified at the hearing that they had been required to use routes specified in a route book prepared and given to them by Sloop and that they were authorized to deviate from the selected route only in extreme situations, such as very bad weather. Driver Barry Gordon Foster testified that Sloop also specified the routes to be used for backhaul. Drivers were paid on basis of the the mileage available from the routes Sloop designated. A driver, whose name Foster could not recall, had been dismissed because he became involved in an accident while off the designated route. Driver Howard C. Eller testified that about 2 years before, he had found it necessary to speak to Sloop to obtain permission to change a designated routing which Eller considered to be extreme]y dangerous. Sloop, in turn, had consulted Transportation Vice President Odell Whittington,[22] before responding. Eller was not certain whether it was Whittington or Sloop who later authorized the suggested route change.

Sloop testified that there were routing directories—the Holly Pack route book for fresh chicken deliveries—and the Holly Farms fried chicken directory. These books contained driver information compiled by him, indicating customers' names, addresses, and directions to the customer locations. The fried chicken directory listed approximately 600 customers and specific travel directions. As the shelf life of fried chicken is longer than that for fresh chicken, the fried chicken route book provided for multistop loads. There were not as many stops in the Holly Pack directory, but both books established routes to be taken by direct drivers.

Sloop prepared the first such directory—for fresh chicken deliveries—in 1981, about 2 years after becoming driver-coordinator, at the direction of Vernon Church, then Holly Farms vice president, transportation. Church worked with Sloop on the document and, when completed, Church approved its use. Sloop next assembled the separate fried chicken directory in 1984. Both route books were revised after six to eight new customers were obtained. To route drivers on interim bases during periods when less than six

[17] The outhaul manager booked outside carriers to make outhaul deliveries of Holly Farms products from Wilkesboro in place of company owned trucks.

[18] Absher was the immediate supervisor of drivers based in Wilkesboro.

[19] After September 25, when Sloop became safety and personnel manager for Tyson, he personally took over what, under Holly Farms, had been the work of the entire hiring committee.

[20] Only Sloop administered road tests, during which respective applicants, with Sloop as passenger, would drive 25 miles performing various truck maneuvers characteristic of a daily run.

[21] Sloop culled the pallet receipts from shipping tickets and filed the information as to where the pallets had been left—in effect keeping records of which companies owed Holly Farms pallets, and vice versa.

[22] Odell Whittington preceded David Hayes as Holly Farms vice president for transportation.

to eight new customers had been aggregated, Sloop would post handwritten directions on the drivers' bulletin board. Sloop determined the routes to be used in consultation with the drivers who might suggest ways of traveling to new customers.

Responding to driver Foster's above testimony that a driver had been terminated for deviating from the prescribed route, Sloop related that, in 1983, a driver named Myers had had an accident while not following the directory routing and that Myers had been terminated because of the accident.

While the directories still were given to new drivers since Tyson assumed control of Holly Farms, the route books now serve merely as guidelines because Tyson has its own routing system in the form of computer printouts.

Sloop denied that, as driver-coordinator, he had authority to assign work, to transfer or promote employees, to grant pay increases, or to effectively recommend any of the above. He also denied having had any formal role in the adjustment of grievances. Informally, however, as his office had been in direct line from the drivers' parking lot to the transportation office, drivers stopped by to talk to him about their problems, and Sloop did tell drivers that he would mention their concerns to management officials. Beyond that, Sloop denied having any role in solving or answering drivers' complaints.

The evidence conflicts as to whether Sloop played a role in disciplining drivers. Donald Kanupp testified that, on June 1 while still a Holly Farms driver, he received a written logging violation for violation of the 70-hour rule, a U.S. Department of Transportation (DOT) time limit on truck operation, notifying him that such a discrepancy had been detected in the preparation of Kanupp's daily logs for May. The form directed Kanupp to report to Sloop as soon as possible and was signed by Sloop as ''Company Official.'' Kanupp, however, testified that he had received the logging violation form on about June 1 from Sloop while they were alone. Sloop asked the reason for the violation on Kanupp's log—he was about 15 minutes over the permitted 70 hours. Kanupp replied that the only thing he could figure was that he had just miscounted. Sloop entered Kanupp's explanation on the bottom half of the form and both men signed it. Sloop told Kanupp that this writeup for a logging violation would go in his file.

John E. Danner testified that in August 1986, he had attempted several times to deliver frozen products to a destination in Cincinnati, Ohio. However, the receiving agent repeatedly refused to accept the load. When Danner returned to that dock after having been reassured by the Holly Farms dispatcher that the matter would be straightened out, the receiver, accusing him of attempting to go over his head, again refused the load and asked Danner to leave the premises. After Danner made a second call to the appropriate Holly Farms staff and a resultant third delivery attempt, the receiver called the Wilkesboro dispatch number and Sloop ordered Danner back. When Danner returned, Sloop told him that if that happened again, he would put a reprimand letter in Danner's file. Danner did not know whether a disciplinary note was placed in his file.

Gene Hester testified that in mid-August, he was present in Sloop's office when Sloop attempted to discipline driver John Thompson. According to Hester, Sloop had prepared a written warning, telling Thompson that he erred in completing his logs. Thompson replied that he did not want to change his logs as he felt that he had prepared them correctly. Hester related that Sloop ultimately agreed that Thompson was correct and discarded the written warning, but told Thompson that the record of their conversation stood.

Finally, driver Robert Gwyn Wyatt testified that on March 3, in snow and ice, he had had an accident near Toledo, Ohio, in which his truck slid into a guardrail. Only Wyatt's vehicle was involved, the damage assertedly had not been serious and Wyatt had duly called his office to report the incident at the earliest opportunity.

According to Wyatt, about 4 or 5 days later, Sloop came into the drivers' room where several other drivers, including Wyatt, were talking. Sloop told Wyatt that he should have been fired 100 times since he had been with Holly Farms. When Wyatt asked why, Sloop told him because of his driving record; the guardrail in Toledo had not flown up and hit him, had it? Wyatt answered no, but that that had been a weather-related incident and that he never had been charged with a weather-related accident. Sloop replied that a chargeable accident is anything the Company wants it to be. When the other drivers began to criticize Sloop, Sloop left the room.

Sloop explained that drivers were required to keep logs of all their activities while on the road—indicating their sleep time, driving time, off-duty time, *etc*., which information was noted by the log clerks when the logs are turned in together with the drivers' other paperwork. Sloop explained that records of logging violations were kept by the Respondents because of DOT regulations; DOT audited the Respondents' daily drivers logs and trip reports. Sloop testified that his only function in that area had been to make up and file logging violation forms. Sloop, not involved with DOT audits, did not know whether DOT ever had asked to see violation forms. Sloop, however, admitted that DOT fined companies, and even drivers, for such violations.

When a logging violation, such as that recorded for Kanupp,[23] was called to Sloop's attention by the logging clerks, he would enter the violation on the appropriate form; discuss with the driver his reasons for the violation, noting the reasons on the form; and file the form, with a copy going to the employee's personnel file. Sloop testified that while he had responsibility for compiling logging violations, they had not constituted grounds for discipline. Only six such violation forms have been used.

With respect to Hester's testimony concerning driver John Thompson, Sloop recalled that in August, Thompson, en route to his car parked just outside Sloop's office door, complained to Sloop that he was angry about not being dispatched fairly in that he was not getting as many trips as he felt entitled. Sloop, in turn, told Thompson that he had violated the 70-hour rule and asked him to sign the violation form. Thompson, repeating complaints about his lack of assignments, refused to sign anything. Sloop later reported Thompson's refusal to sign the violation form to Hayes who

[23] Sloop essentially agreed with Kanupp's account of what had occurred when Kanupp was given his logging violation notice. However, Sloop maintained that he did not recommend further action against Kanupp because of this infraction. Sloop related that he had spoken to Kanupp at Vice President Hayes' request and had told Kanupp that the incident was no major violation but would be written up as a matter of record.

told him to write it up and to put it in Thompson's file without the latter's signature, which Sloop did.

As to the Wyatt incident, Sloop related that, in February, after the union campaign had started, he was passing through the drivers' room where several drivers, including Wyatt, were seated. All were praising the Union. Wyatt, who had had several accidents in the past, had just had another. After hearing Wyatt speak well about the Union, Sloop asked Wyatt how many times could the Company have fired him under a union contract. Wyatt answered maybe once or twice. Sloop retorted what did he mean once or twice? ''We could have fired you a couple of weeks ago when you had that wreck on the ice.'' When Wyatt said that that was not chargeable, Sloop asked what Wyatt meant that it was not chargeable. How fast had that guardrail been running when it hit him. Sloop described the exchange as just one big joke, relating that everyone laughed, that Sloop went on his way and that nothing more was said about the matter by himself or Wyatt.

Earlier, Sloop, on November 27, 1984, and October 5, 1988, respectively, had issued directive memoranda to ''All Drivers'' in his own name, without job title, outlining procedures to be followed by the drivers in certain situations. In the 1988 memorandum, Sloop noted that Holly Farms had made agreements with certain outside concerns to perform unloading services of products from two specified sources for delivery at two locations in Salem Virginia, at a maximum charge for such loads of $75 regardless of load size. In this memorandum, drivers were instructed as to where to call for applicable unloading and who to call when running late. The 1984 memorandum detailed procedures drivers were to use when picking up pallets.

When, on September 12, the Respondents wrote to the drivers offering them, jobs with Tyson, Sloop was referred to in the letters as to the party to whom to respond by the September 22 deadline.[24]

Sloop testified that, in 1986, at the request of Outhaul Manager Barry Wood, he accompanied Wood and Chief Dispatcher Bob Absher to the home of a driver for the purpose of terminating that employee for a specified infraction. Sloop related that his role was passive during that visit. While the driver was discharged on that occasion, Sloop merely had been present.

Sloop was salaried, as were members of management, including all who served with him on the hiring evaluation committee, while drivers basically were paid on the basis of their mileage. Sloop testified that management benefits were basically the same as those paid to drivers—company-paid long-term disability and medical coverage,[25] life insurance, and a noncontributory retirement plan. When Sloop had become salaried in 1979, those benefits and his earnings were unchanged except that he received an extra $10,000 in life insurance coverage.

In 1989, prior to the arrival of Tyson, Sloop was not obliged to wear a uniform, but occasionally wore a coat and tie.

While Sloop, as driver-coordinator, lacked many of the supervisory indicia set forth in the disjunctively construed Section 2(11) of the Act in that he could not, in Holly Farms' interest, independently discharge, transfer, suspend, lay off, recall, promote or reward employees, adjust their grievances, or effectively recommend such actions, I, nonetheless, find that while he held that position he was a supervisor within the meaning of the aforesaid section of the Act.

A clear indicia of Sloop's supervisory status was his role as a full participant in the work of the committee that evaluated and effectively recommended driver-applicants for employment. There, Sloop cast votes equal to those by senior management and supervision. Except for Sloop, the supervisory status of all members of this standing committee was conceded, and on the basis of these votes, drivers were selected for hire. While Sloop's vote was only one of several cast concerning each applicant and while no one was hired in this process because of Sloop's vote alone, his votes in this setting were counted as much as any of the involved supervisory personnel and his evaluations constituted structured, effective recommendations as to who should be hired. While Sloop's attendance at other types of management meetings were more irregular, based on whether any of his areas of responsibility were to be considered, the record reveals that Sloop's attendance at managerial meetings were not limited merely to those related to hire.

Sloop, however, had even greater involvement in the overall hiring process than did other members of the evaluation committee. When Hayes would begin the process by asking Sloop to ''pull'' driver applications, Sloop determined which of the many on file would be selected for processing at that time. There was no requirement that this initial selection be random and the record shows that Sloop, in fact, did the initial screening before giving the applications to Hayes. After driver-applicants were graded by the evaluation committee, Sloop, more than others, participated in the further processing of high-scoring applicants, shepherding them to physical examinations and interviews and in administering, evaluating and certifying the prerequisite road tests. While Sloop's role in Holly Farms multifaceted hiring procedures was subordinate to that of Hayes, no one else was more actively or responsibly engaged.

In addition to his ability to recommend the hire of employees as part of a supervisory panel, Sloop was afforded other indicia of special status. Unlike drivers, he was salaried; enjoyed job benefits somewhat superior to the drivers; had his own office; as Holly Farms representative, signed logging violations for which drivers could be subjected to DOT-imposed fines; prepared and distributed routing books which drivers were obliged to follow and which established fixed mileages to destinations on the basis of which the drivers were paid; orally and publicly reprimanded an employee for his driving accident record and, at the Company's request, accompanied supervisors to the home of an errant employee to witness that employees' discharge. After Tyson assumed control and while Sloop still was driver-coordinator, Holly Farms' drivers were directed in writing to notify Sloop by a date certain whether they would accept employment with Tyson under changed terms.

From the foregoing, I find that Sloop, when driver-coordinator, was a supervisor and agent within the meaning of Section 2(11) and (13), respectively, of the Act, as he could ef-

[24] As noted, Sloop did not attain uncontested supervisory status until his September 25 promotion.

[25] Employees received medical coverage from the Company but paid to have such insurance extended to their spouses and families.

fectively recommend hire. I, in any event, find that the Respondents had cloaked Sloop, while driver-coordinator, with sufficient apparent authority for him to have been reasonably regarded by employees as an agent of management for purposes of the unfair labor practices herein.[26]

C. *Events Occurring Before Tyson's July 18 Takeover*

1. The alleged 8(a)(1) violations affecting the drivers-yardmen unit—facts and conclusions

a. *By John Sloop*

John C. Danner[27] testified that on January 21, he went to Driver-Coordinator John Sloop's office to report an accident. After making his report, Sloop asked how he felt about the Union. Danner told Sloop that, as he knew,[28] Danner supported the Unions. Sloop declared that he guessed that Danner knew that if the Unions came in, Holly Farms President Blake Lovette would sell all the trucks, do away with the transportation division and that everyone there would be terminated.

Sloop's recollection of the incident was poor. He remembered that in January, Danner, an outspoken union supporter, had come to his office on his own initiative and had spoken to Sloop about the Unions, what they were going to do for the drivers; and, in nonspecific terms, what they were going to do for Sloop. Danner had referred to the number of drivers who were going to vote for the Union in the coming representation election and suggested that Sloop, too, might want to cast his ballot for the Unions. Sloop initially could not recall anything having been said either by Danner, or by himself about reducing the size of the Company's tractor fleet, but then denied that, at any time before the election, he had stated to employees that the Company would sell off its tractors or that jobs would be lost.

I credit Danner's account of this conversation. His recollection of the specific conversation was clear, he was more forthright than was Sloop and, as will be discussed, Sloop's conduct, as described by Danner, was consistent with an extensive pattern of company threats. However, Sloop's interrogation of Danner as to how he felt about the Unions was not violative of the Act since Danner was a known union supporter.[29] I find that the Respondents violated Section 8(a)(1) of the Act both by threatening that if the employees selected the Union in the coming representation election, the Company would sell off its trucks,[30] and the transportation division employees all would lose their jobs.[31]

Transportation department driver Harden Branscome testified concerning two conversations with Sloop in the period before and during the drivers' election, held on March 9, 10, and 11. In February, about 2 weeks before the voting, Sloop called Branscome and some other drivers into his office and told them that if the Company won the election, the Company within 6 months, would get rid of all of the trucks and the drivers would lose their jobs. There was no response to this.

According to Branscome, on March 10, one of the days when the election was conducted, he encountered Sloop who invited him to his office. There, Sloop told Branscome that the Company was going to win the election; that after the Teamsters went back to Kernersville,[32] the Company was going to start solving some of the employees' problems. Branscome conceded that it would be fair to call his March 10 conversation with Sloop a ''debate'' in that Branscome, a known union supporter, had discussed the Unions with Sloop on several occasions.

Gene Hester, a long-distance Holly Farms driver, testified that in late February, he had stopped by Sloop's office to chat. While there, Hester complained about the excessive waiting time experienced at destinations.[33] Hester also told Sloop that the Unions were going to win the election. This statement by Hester about the Unions' election prospects was part of an ongoing, friendly, and frequent discussion between the two men and Sloop then was well aware of Hester's prounion stance. Sloop, however, told Hester that there was no way the Unions were going to win the upcoming election and, if the Unions did win, they all would be out of jobs—''All of us would be out of a job.'' Also during that conversation, Sloop told Hester that if the employees would send the ''S.O.B.'s'' back to Kernersville and air their grievances with (Holly Farms president) Blake Lovette, they could work it out themselves. Sloop concluded that if they did not do this, they all were going to wind up without jobs.

Sloop's response to the above-described testimony of Branscome and Hester essentially was to make the same generalized denials that he had entered with respect to Danner—that he had known at the time of the conversations that Branscome and Hester both were avid union supporters but that he had not made any statements threatening the loss of jobs if the employees selected the Union. Sloop did not refer to any particular conversation with either drivers.

In evaluating the respective testimony, I credit the more specific detailed accounts of Branscome and Hester as to what Sloop told them on the occasions in question. While the record, as it will be developed, shows that Hester and Branscome were closely associated in certain aspects of their union activities and had ample opportunity to put together similar stories concerning Sloop, the record also will establish that considerable unlawful conduct was directed against both men by other company supervisors, increasing the prospective accuracy of their more precise accounts of what took place on the described occasions. Also, the cordial relationship between Hester and Sloop lessened the likelihood

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[26] ''*Restaurant Horikowa,*'' 260 NLRB 197, 203 (1982); *J. P. Stevens & Co.*, 243 NLRB 996, 1000–1001 (1979).

[27] Danner was employed by Holly Farms as a long-distance truckdriver for about 3-1/2 years before testifying at the hearing. He continued to work in that capacity for Tyson.

[28] The Unions earlier had named Danner in a letter to the Company listing the names of the employees who were members of its in-plant organizing committee. Sloop had seen this correspondence.

[29] *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985).

[30] *Hood Industries, Inc.*, 248 NLRB 597, 600 (1980), supplemented 273 NLRB 1587 (1985).

[31] *Harrison Steel Castings Co.*, 293 NLRB 1158, 1168–1169 (1989).

[32] Local 391 is based in Kernersville, North Carolina.

[33] Drivers' waiting fees, compensation for time spent at customers' facilities waiting for unloading, and for backhaul loads, were substantially reduced in December 1988. Drivers, at that time, had been expected to contact Sloop with questions concerning waiting time.

that Hester would portray Sloop in unreservedly negative terms.

Accordingly, I find that the Respondents violated Section 8(a)(1) of the Act by Sloop's conduct in telling Branscome that if the Company won the election, all the employees would lose their jobs; by Sloop's statement to Hester that if the employees won the election, the employees all would lose their jobs; and by promising Branscome and Hester that if employees, in effect, got rid of the Union, the Company would resolve the employees' grievances.[34]

The General Counsel again referred to the incident, more fully described above in connection with the discussion of Sloop's supervisory authority, where, shortly after driver Robert Gwyn Wyatt's March 3 accident in slippery weather, Sloop had criticized him before a group of other drivers in the drivers' room, as a threat of unspecified retaliation in violation of Section 8(a)(1) of the Act. Sloop, referring to the accident, had told Wyatt on that occasion that he should have been fired 100 times since he had been with the Company because of his driving record and that the accident, although occurring in icy conditions, could be chargeable, although, as Wyatt had protested, accidents that took place in such conditions usually were not. Sloop related that he had so spoken to Wyatt after hearing him and the others praise the Union.

Wyatt further testified that earlier, in late February, Sloop beckoned to him as he was walking across the parking lot. Sloop was on the lot with since retired driver Claude Whittington. When Wyatt walked over, Sloop asked, ''Why don't we form a committee and do away with and forget about the Union? We will form a committee and sit down and talk about our problems. Forget about the Union.'' Wyatt replied that he did not like the idea of a committee because anything the committee might agree to would not be binding on the Company. Sloop told Wyatt that if the Union is voted in, in 6 months we will all be gone. Wyatt responded, ''Well John, I'll tell you. If you've done your job, you ain't got no problem. If you ain't done your job, you shouldn't have your job anyway.'' Sloop told Wyatt that he could retire; he was better off than and would not be affected like some of the rest.

Sloop remembered the parking lot incident involving Wyatt as having taken place in late February or early March as he and Claude Whittington were agreeing that they did not need a union and that what they should do is form a committee through which they could discuss their problems. When Wyatt joined them, they suggested to him that the drivers should form a driver-management committee. Wyatt had told them that if they did not get a union in there, none of them would have a job. Sloop replied that he did not want to do that. Sloop denied that there had been any argument between himself and Wyatt on that occasion or that he had said words to the effect that, if the Union came in, employees would lose their jobs; that he had referred to a period of 6 months; or that Wyatt had told him that Sloop would not have to worry about his continuing to have employment if he did a good job. Whittington did not testify.

Again, I would credit Wyatt's account of his conversations with Sloop. From Sloop's own testimony, it can be found that he had criticized Wyatt in the drivers' room because Wyatt, at the time, had joined in verbally supporting the Unions. Wyatt's testimony that Sloop, during their parking lot conversation, had told him, among other things, to forget the Unions and join in forming an employees' committee to negotiate with management, does not differ greatly from Rester's above account of Sloop having advised him that if the employees abandoned support for the Unions and the Company would resolve all their grievances. Such statement was a company promise to resolve the employees' grievances if they would stop supporting the Unions. Wyatt's description also is consistent with what Sloop, as found here, told a number of drivers—that if they selected the Union, their jobs would be lost.

From the foregoing, I find that the Respondents violated Section 8(a)(1) of the Act by Sloop's conduct in threatening Wyatt with unspecified reprisals, in the context of Wyatt's prounion discussion with the drivers, by telling Wyatt that he could have been fired 100 times because of his driving record; by having told Wyatt in the parking lot that if the unions were voted in, the employees would lose their jobs;[35] and by telling Wyatt, in Whittington's presence, to forget the Unions and join in forming a committee to negotiate with management over working conditions.[36]

Long-distance driver Barry G. Foster testified without contradiction that in early April, after the Unions were certified as bargaining representative for the drivers-yardmen unit, Sloop told Foster in the drivers' room that the Company wanted to sign a contract with the Unions. Foster replied that that was fine; it was what the drivers wanted. Sloop, however, went on to say that the way the Company was willing to do this would be to sign a contract for 1 year, with the drivers continuing to earn the same as they had been. Foster told Sloop that that would not work; the drivers did not want it that way. Sloop replied that that was the only way the Company would sign a contract.

In agreement with the General Counsel, I find that the Respondents violated Section 8(a)(1) of the Act by Sloop's above statement to Foster, when negotiations for a first collective-bargaining agreement were beginning, to the effect that the Company would not sign a contract containing a pay raise in that such statement indicated it would be futile to select the Unions as bargaining agent.[37]

b. *By Murl Murphy*

Terry Layman, a truckdriver, testified without contradiction that in late December 1988, his dispatcher and supervisor, Murl Murphy, gave him an envelope with his name on it. When Layman opened it in Murphy's presence, a union authorization card fell out. Murphy told Layman that he hoped he did not find out who had sent this to him. Layman did not answer and Murphy continued that he thought he probably knew who had sent the card to Layman.

I find that by Murphy's comment to Layman that he hoped he did not find who had sent the authorization card to Layman, the Respondents violated Section 8(a)(1) of the Act by Murphy's threat to Layman that he would take unspecified

[34] *NLRB v. Arrow Molded Plastics*, 653 F.2d 280 (6th Cir. 1981).

[35] *Jay Foods*, 228 NLRB 423, 430 (1981).

[36] *American Display Mfg. Co*., 259 NLRB 21, 32 (1982).

[37] *E. I. du Pont & Co*., 263 NLRB 159, 165 (1982).

reprisal against another employees whose identity he may have surmised, for engaging in union activities.[38]

c. *By Blake Lovette*

Blake Lovette[39] testified that he first became aware of the Unions' organizing activities in the Holly Farms transportation division on December 24, 1988. On January 4 through 6, he met with drivers at company facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Temperanceville, and Harrisonburg, Virginia; and Center and Seguin, Texas. At each of these meetings, Lovette delivered the same speech, verbatim, to a total of about 180 drivers. This speech, in relevant part, contained the following language which, the General Counsel and the Union argue, constituted an unlawful threat to discontinue the Holly Farms trucking operations if the employees should select a union to represent them:

> If we felt felt that we should contract out our hauling, we would have the right to propose that, too. And you may know that that is exactly what some of our competitors do.
>
> . . . .
>
> I am just telling you that no union could prevent us from reducing pay or benefits, or from going to outside contractors to haul product, or to do anything else that we do, if we in good faith thought that we had to do that for sound business reasons.

However, in the passage marked by the above asterisks and not referenced in the General Counsel's brief, Lovette's speech also contained the following:

> Now, I am not raking any predictions. I am not telling you we would contract our hauling out if you brought a union in here. The truth of the matter, I prefer that we do our own hauling, union or no union, as long as we can do it and it's good business for us to do it.

I find that the above disclaimer neutralized any threat in the January speech to contract hauling should the employees choose the Unions and that the disputed passage was not unlawful.

However, on about February 18, Lovette delivered a second verbatim speech to drivers at the same locations as in early January in which he again addressed the matter of using outside carriers in the context of the Unions' organizing campaign. In this February speech, Lovette told the drivers:

> Well, we have talked a lot about poultry companies going to contractors to haul their product. We considered that back in December, and decided against it. . . . But I also told you that contracting the hauling is an option we have and will continue to have. As soon as word of this union situation got out, we got calls from people interested in buying our tractors and contracting to haul our product for us. I found out right quick it wouldn't be any problem to sell every tractor we own at a good price. And it wouldn't be any problem to hire contractors to haul our product.
>
> There is no good reason, then, for us to pay a noncompetitive cost to haul our own product just because some union should ask us to. Let me put it in plain and simple words. If you should bring this union in here to represent you, and if this union demanded a pay or benefits plan that we in good faith considered to be unsound and unjustifiable from a business point of view, there is nothing to prevent us from making a decision to sell our tractors and contract out our hauling. We might have to negotiate about the impact of that on our drivers, but would not be a problem.

The U.S. Supreme Court has stated in *NLRB v. Gissel Packing Co*:[40]

> . . . an employer is free to communicate to his employees any of his general views about . . . a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that [c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell ''what he reasonably believes will be the likely economic consequences of unionization that are outside his control, and not threats of economic reprisal to be taken solely on his own volition.'' *NLRB v. River Togs, Inc*., 382 F.2d 198, 202 (2d Cir. 1967).

As further interpreted by Administrative Law Judge Roth in his Board and Court-approved decision in *Blue Bird Body Co*.[41]

[38] See *U.S. Tubular, Inc*., 280 NLRB 710, 715 (1986), where the employer, inter alia, analogously had threatened to find out who signed authorization cards.

[39] Lovette, president of Holly Farms Food, Incorporated, a wholly owned subsidiary of Holly Farms Corporation, since February 1988, after the merger became general manager and senior vice president of the Tyson Foods Fresh Retail Division. As such, Lovette continued to be responsible for production, sales, and marketing of Holly Farms and also Tyson brands fresh chicken products.

[40] 395 U.S. 575, 618–619 (1969).

[41] 251 NLRB 1481, 1488 (1980), enfd. 677 F.2d 112 (11th Cir. 1982).

> employees because of their economic dependence on the Employer tend to ''pick up intended implications . . . that might be more readily dismissed by a more disinterested ear,'' . . . the employer's statements must be carefully phrased on the basis of objective fact and . . . the employer must bear the responsibility for any misleading ambiguity on his part.

Applying the above authority, I find that Lovette's February speech to employees describing how readily the Respondent would and could sell its tractors and contract out the drivers' unit work should they select the Unions to represent them, did not constitute an objectively stated prediction of events beyond the Respondent's control, but was a coercively presented list of options available at the Respondents' whim should collective bargaining, in management's judgment, become bothersome or inconveniently expensive. In the atmosphere created by the Respondents' other unlawful conduct found herein, I find that Lovette's February speech had even a more aggravated tendency to coerce employees.[42] I, therefore, find that Lovette's February speech unlawfully threatened employees that the Respondents would sell the tractors they drove, contract out their work and take away their jobs if they should choose the Unions as their bargaining representative, all in violation of Section 8(a)(1) of the Act.

Long-distance driver Gene Hester testified that, in February he went to Blake Lovette's office to personally deliver a letter from R. V. Durham, president of Local 391, challenging Lovette to debate him. The envelope was sealed with the Teamsters' emblem. When Hester handed Lovette the envelope containing the letter, Lovette told him that the postman usually delivered his mail, and threw the envelope to the floor. Hester picked it up and told Lovette that he wanted to talk to him about the drivers' pay. According to Hester, they then spoke for about 30 minutes, basically about compensation and certain recent company measures that had reduced same. However, as their talk wound down, Lovette declared that he had a company to run and that he did not have time for such stuff as this Union. Lovette declared that if Hester would help him, he could win the campaign. He also told Hester, who had explained about the pay cuts[43] and how the cost of living was rising, that he was a businessman and was not interested in people who only were interested in numbers. Lovette declared that there would not be a union at Holly Farms and, if the employees voted for representation, he would sell the trucks. During this conversation, Hester announced that because of the pay cuts, he was not interested in continuing to drive a truck. Lovette answered that he understood that there were some better positions open with Holly Farms. Hester told Lovette that he was not interested.

Lovette recalled that the conversation with Hester bad occurred on March 1 at about 11 a.m. Hester appeared at the reception area when Lovette was busy with telephone calls. After about a 30-minute wait, Lovette welcomed Hester into his office. As Lovette rose to shake hands, Hester handed him a letter displaying the Teamsters logo. Lovette stated that after he had dropped the letter onto the corner of his desk, it accidentally fell on the floor. He did tell Hester that the postman usually delivered his mail. Hester, who had sat down, suggested that Lovette read the letter. Lovette replied that he would wait to get it from the postman.

Hester told Lovette that if he wanted an end to this business, Lovette would have to rehire a former transportation manager named Lowe. Lovette replied that that would not be possible.

During their talk, Lovette informed Hester that his own job at Holly Farms had been very specifically spelled out by those who had hired him. Lovette was to get the Company profitable, efficient, and competitive within the industry and that no division, specifically the transportation division, would be overlooked in those efforts. The result of the coming representation election would have no bearing on this. Lovette stated that he would work in all ways to make the transportation department more efficient and that his options would remain open even after the election. If the Unions won the election, Lovette would have to bargain with them concerning the impact that any of his decisions might have on the drivers, but he still would have the right to haul his chickens in the most efficient way, retaining the options of selling his trucks and contracting his hauling if those ways were the most efficient.[44]

Lovette related that he told Hester that Holly Farms was a very good place to work. It provided good wages and benefits. Lovette wanted to get this business behind him and get on with making good chickens and selling them well and competitively. Lovette expressed the hope that the drivers would not encumber him by bringing in a union. He described that meeting of about 15 minutes as his only one with Hester from January 1 through the time of the election. Lovette did not deny Hester's testimony that, during that conversation, he had told Hester that there would not be a union at Holly Farms; that he had asked Hester's help to enable him to win against the Union's campaign; and that, when Hester had protested the pay cuts and had stated his disinterest in continuing to drive for Holly Farms, Lovette had offered him other work.

From Hester's undisputed testimony, I, therefore, find that Lovette's statement that there would not be a union at Holly Farms violated Section 8(a)(1) of the Act because an unlawful expression of the futility of supporting the Union.[45]

I conclude that the Respondents further violated Section 8(a)(1) of the Act by Lovette's statement, in effect, that whether the Unions won or lost the election, he had the option of selling all the trucks and contracting out hauling.[46] As the offer to find other work for Hester in the context of

[42] *Harrison Steel Castings Co.*, 293 NLRB at 1159.

[43] In 1988, Holly Farms had reduced drivers' compensation by substantially lessening what they were paid while waiting at customers' premises to be unloaded or for a different load for backhaul delivery. Fees for recovering pallets were eliminated.

[44] Lovette explained that his reference, during his conversation with Hester, to being able to sell all the trucks and to contract out hauling was not based on the then current union campaign but on the premise that Holly Farms' conduct of its operations would not really be changed by the presence or absence of a union and that the use of contract carriers was an option available at any time.

[45] These expressions are similar to those found unlawful above in Lovette's February speech to employees.

[46] *Jays Foods*, 228 NLRB 423, 430, enfd. as modified 573 F.2d 438 (7th Cir. 1978), cert. denied 439 U.S. 859 (1978) (threat to sell trucking operation); *SMCO, Inc.*, 268 NLRB 1291, 1293 (1984) (threat to subcontract unit work).

Lovette's request for his assistance against the Unions was not alleged as an unlawful inducement, I make no finding in this regard.

d. *By Curtis (Bob) Absher*

Long-distance drivers Teddy Ray Hayes and Harden Branscome testified to a late February conversation with Head Dispatcher Bob Absher. Both drivers had just returned from a trip taken together. While Hayes was completing his logs, Branscome spoke to Absher through the dispatchers' window about the forthcoming union election. Branscome told Absher that he was so certain that the Unions were going to win that he would quit if they lost. Absher replied that he was real sure that the Company was going to win and that, if it did, the trucks would be gone from Wilkesboro within 6 months. The Company, Absher continued, would use all the outside trucks they could to get away from having to use company trucks.

Absher explained that he had known Branscome for about 10 or 12 years; that they had been good friends for several years and that, during the first months of 1989, Branscome had been coming to the drivers' room[47] where, in friendly fashion, he would tell Absher, ''We're going to win,'' and Absher customarily would reply, ''No, you're not going to win.'' Absher recalled that on one occasion in late February, Branscome came in and, as usual, told Absher that we are going to win. Absher told Branscome that he did not think that they were going to win, adding that ''they are going to use you for a scapegoat.'' Branscome replied that he would stay with the Company until the Unions won and then he would be out.

Although Absher testified that although he had been asked by the Company before the start of union activities to increase the use of outside carriers, he denied having said anything to Brangcome about whether the Company was going to keep or get rid of its tractors; whether it was going to increase the use of outside carriers; or whether it was going completely to the use of contract carriers.

While, as argued by the General Counsel, the testimony of Branscome and Hayes concerning what was said by Absher is mutually corroborative, both men, as noted, were closely associated in their union activities, with each other and with Hester, suggesting the possible absence of spontaneity in their testimony. However, from Blake Lovette to John Sloop, I have found repeated references by responsible company representatives to the possibility that, whether or not the Unions won the election, the Company would sell its trucks md contract its hauling operations. In this context, I find that Branscome and Teddy Ray Hayes are corroborated by the general evidentiary pattern and I credit their testimony. I, therefore, find that the Respondents violated Section 8(a)(1) of the Act by Absher's statement to Branscome, in Hayes' presence, to the effect that if the Company did win the coming representation election, that the Company would stop using its own trucks and completely replace them with trucks owned by outside carriers. Even if Absher's statements to Branscome, overheard by Hayes, were made in the context of a friendly relationship and in the form of an opinion held by Absher, his remarks nonetheless were coercive because made by an acknowledged supervisor who professed to speak from knowledge.[48] In addition, the fact that Absher and Branscome were personal friends only served to enhance the impression that Absher was speaking on management's behalf.[49]

e. *By David Haves*

Long-distance driver John E. Danner testified that, in late February, while he was in the drivers' room waiting to be sent out, David Hayes, Holly Farms' vice president for transportation, asked to speak with him privately. Accordingly, after the two men had stepped onto the back porch, Hayes told Danner that he knew that his name was listed among the members of the Unions' organizing committee.[50] Danner agreed that this was true. Hayes asked if Danner realized that this was serious. Danner replied that he did and thought that that was something the employees needed. When Hayes disagreed, Danner asked him, for argument's sake, to state his views. Hayes declared that Danner knew that if the election went through and the Unions should come in, Blake Lovette will disband transportation, remove all the trucks and all the drivers will be terminated. Danner answered that he did not think the Company could do that—not under Federal law.

David Hayes, in turn, recalled that in December 1988, Danner came to his office holding a recently distributed copy of a pay change notice. Danner declared that while he knew that Hayes had had nothing to do with the change in pay he was disappointed in it. Hayes spoke to Danner about Danner's last trip. Nothing during that conversation was said about the use of outside carriers. Hayes testified that that was his last conversation with Danner and that there was no other occasion when he and Danner spoke about the Union and the representation election.

Danner impressed me as being a forthright witness whose testimony is entitled to additional weight because of the risk he had taken in testifying against his Employer's interest while he continued to work under Hayes.[51] Also, Hayes' threat that, should the Unions win the election, the Company's trucks would be sold and that outside carriers would be retained to do the hauling is consistent with a series of like statements made to a range of employee witnesses by a variety of company supervisors. I, therefore, credit Danner's account and find that the Respondents violated Section 8(a)(1) of the Act by Hayes' threat to Danner that should the Unions win the election, the Company's trucking operation would be discontinued; the trucks removed; and the transportation employees terminated.[52]

William F. Johnson, a long-distance driver for Holly Farms based at Glen Allen (Richmond), Virginia, testified that, in mid-February, he and other employees attended a meeting with Holly Farms officials Blake Lovette, president;

[47] The drivers' room, separated from the dispatching office by a half door, was used by drivers to finish their paperwork—for signing in, picking up bills of lading, and completing logs.

[48] *Harrison Steel Castings Co*., 293 NLRB at 1168.

[49] *Colorado-Ute Electric Assn*., 295 NLRB 607 (1989).

[50] As noted, the Unions previously had sent the Company a letter, dated December 28, 1988, the first of a series of four, identifying Danner and others as employee members of their in-plant organizing committee. Hayes also knew Danner to be a union activist since January from newspaper stories quoting Danner on the subject.

[51] See *Rodeway Inn of Las Vegas*, 252 NLRB 344, 346 (1980); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

[52] *Jays Food, Inc*., 228 NLRB at 430.

David Hayes, vice president for transportation; A. Gerald Lankford, vice president for human resources; and Pete Lovette, treasurer.[53] During the meeting, Lankford told the employees how much more money they could be making, explaining that if the Company removed four trucks from the plant, the remaining drivers could obtain much better mileage and, thereby, increase their earnings.

Johnson related that on April 16, after the election, having just returned from a trip, he asked Raymond Strong, a dispatcher,[54] if he was going to get back out that night. When Strong said, ''No.'' Johnson asked why, indicating that four trucks were being loaded outside. When Johnson finished his paperwork at about 1:30 p.m., he called David Hayes and reminded him that the men had been told in February, that if four trucks were taken out of operation, the remaining drivers would get more mileage and money. Hayes remembered this, but told Johnson that he had gone his way and joined the Union anyway. Accordingly, Hayes had to have some trucks to cover himself. Johnson asked if that was all that Hayes had to say. When Hayes started to say something else, Johnson hung up.

Hayes recalled that on April 16, Johnson had phoned him at his Wilkesboro office, telling Hayes that he had run trips that week of about 130 miles each and that he could not live off the proceeds of such mileage. Hayes replied that the Company was doing all it could, was trying to get him more miles and asked for more time. Johnson retorted that he did not believe Hayes. Hayes related that this was followed by about 10 minutes of discussion centered around Johnson's complaint that, in spite of the Company's February promise and the layoff of certain Richmond drivers, the remaining Richmond drivers had not received any additional mileage. Hayes, in turn, outlined various measures that the Company had taken to obtain more business, including where it had picked up new accounts. He tried to assure Johnson that the Company was trying everything, even to the point of having laid off drivers in Glen Allen and Temperanceville, Virginia, and Wilkesboro, North Carolina, in order to create additional mileage for the remaining drivers.

When Johnson told Hayes that he did not believe him, Hayes answered that he was sorry, but if Johnson had patience, Hayes was sure that the situation could be turned around. Johnson declared that the drivers were not going to stand for this. Hayes, interpreting this statement as a drivers' strike threat, informed Johnson that if the drivers did strike, the Company would continue to do business and use outside contractors. When Johnson asked if that was it, Hayes said, ''Yeah.'' Johnson hung up abruptly.

I credit Johnson's account of his April 16 conversation with Hayes. As argued by the General Counsel, descriptions of this conversation by both Hayes and Johnson are similar, except that Hayes' account does not contain the controversial statement charged by Johnson to the effect that Hayes had told Johnson that he was not receiving longer trips, more mileage, and more money because he had joined the Union. Johnson impressed me as a candid, if not particularly benign witness who did not oppose the layoff of other drivers if that could result in more work for himself. Johnson's basic question to Hayes was that if, as promised, greater mileage could be made available to the remaining drivers by the layoff of other drivers, where was his share of the resulting extra work? Since such a position does not cast the proponent in a particularly favorable light, it is less likely that it would be told if not true. Accordingly, I find that the Respondents, through Hayes, violated Section 8(a)(1) of the Act by retaliating against Johnson for having joined the Union by not providing promised additional mileage.

In assessing Hayes' general credibility, I note that in a speech delivered during the week of January 13 to groups of Holly Farms drivers, successively, at Wilkesboro and Monroe, North Carolina, and Glen Allen, Temperanceville, and Harrisonburg, Virginia, he made the following statement at a time when, by his own testimony, he was actively espousing reductions of the Holly Farms truck fleet, had already made two such reductions and was contemplating additional cutbacks:

> I heard them [Holly Farms drivers] . . . . talking about these independents being a sorry bunch, and so on, and how much better our company drivers are. I agree with that, and I certainly prefer to run our own equipment, with own drivers. If Holly goes to outside contractors, I stand to lose my job.

While hyperbole is to be expected in preelection propaganda, Hayes' above-exemplified misrepresentation to defeat the Unions was sufficiently excessive to weigh adversely on his credibility.[55]

f. *The no-access/no-solicitation rule at the parking lots and related incidents*

(1) The threats to arrest employees

Long-distance drivers John E. Danner and Robert Gwyn Wyatt testified that on April 3, after the Unions had been certified as bargaining representative for the drivers-yardmen unit employees but while organizing efforts still were in progress among live haul unit and plant employees, they and driver Dennis Lackey were in the middle of one of the parking lots at the Holly Farms Wilkesboro complex passing out union literature to employees leaving work at the main plant and at the nearby Food Service (Convenience Foods) facility. Wyatt, without contradiction, denied that he and the two others had obstructed traffic or had interfered with the Respondents' business. At around 2:15 p.m., after they had been on the lot for about 15 minutes and had handed out a few handbills, a company security guard approached and asked what they were doing. Whey they explained, the guard told them that Gerald Lankford[56] had said they all would have to leave. As off-duty employees, they had no business on company property. Wyatt protested that they had a legal right to do what they were doing. The guard left and in about 10 minutes returned with another security guard and a city policeman. The policeman told the three men that Lankford had

[53] Pete Lovette formerly had headed Holly Farms' transportation division.

[54] Strong's supervisory status is admitted.

[55] The General Counsel, in their brief, do not argue, and I, from review of the text, do not find that Hayes' hard-line speech to employees during the week of January 13 violated Sec. 8(a)(1) of the Act.

[56] As noted, Lankford, at the time, was Holly Farms vice president for human resources.

said that they were trespassing and that they would would have to leave the Company's property or he would arrest them. The employees were not allowed on company property during nonwork time. The three then decided to leave rather than to face arrest and, possibly, jail.[57]

(2) The arrests of three employees

Drivers Gene Hester, Teddy Ray Hayes, and Harden Branscome related, in this synthesized account, that on that same day, April 3, they, too, were in another parking lot of the Wilkesboro complex also to distribute union literature to employees as they left work. The three men had positioned themselves about 10 feet from the main plant door. At that time, about 2 p.m., the shift was about to end and the men, in fact, did give handbills to some emerging employees.

Soon thereafter, a company guard approached and asked if the three men were Holly Farms' employees. Rester answered, ''Yes.'' Another guard then came up and requested that the men move away from the entrance and further onto the parking lot. The men complied. When the men left their station near the plant door and moved close to the parking lot exit, the guard asked them not to put any handbills on the windshields of the employees' cars. Hester reassured the guards that he would not put handbills on the windshields and volunteered that he would not give handbills to employees going into the plant because they might throw them on the floor. Soon, four or five guards were on the scene. They asked the men to move out onto the street, off company property. The three men refused. Larry Church, in charge of safety and security at the Wilkesboro complex, then arrived, telling the men that they would have to leave. The men replied that they would not leave or move out onto the street; they had a right to handbill employees. After speaking on his portable phone, Church told the men to leave several times and warned them that if they did not move, they would be arrested, Wilkesboro Chief of Police Gary Parsons next came onto the scene, accompanied by a deputy, and gave the three men 15 minutes to leave. The men responded that they were not going to leave. After repeating his order several times, Parsons told the men that they were under arrest. Hayes and Branscome got into the police car while Hester followed them to police headquarters in his own vehicle. The three men were arrested under warrants issued pursuant to a Holly Farms' complaint, signed by Church, charging first degree trespassing. They never were locked up but sat in the lobby of police headquarters for about 2 hours, after which they were released in their own recognizance. Charges against the three men were dropped at an August 6 court appearance.

Hester testified without contradiction that on April 3, while they were seated in the lobby, Magistrate Mary Louise Canter, who later signed their releases, passed through. The magistrate told Hester that a restraining order had been signed limiting his activities on company property. He could go to and from work at the transportation office, but nowhere else. Hester never actually saw this order. However, months later, on about August 1, he received further confirmation of the order's existence when he found it necessary to call Safety and Security Supervisor Church for permission to speak to employees in the cafeteria at a time when, he had learned, Tyson representatives were going to be meeting there with employees. During that call, Church, answering Hester's inquiry, told him that there, in fact, was a restraining order against him and that Church personally did not have authority to grant Hester's request. When Hester, at Church's suggestion, called back soon thereafter, Church told him he could go to the cafeteria as long as he did not distribute union materials.

(3) The written warnings

On about April 6, a few days after they were arrested and released, Hester, Branscome, and Teddy Ray (T.DR.) Hayes, during separate interviews with Transportation Vice President David Hayes, were given written warnings, dated April 3.

On April 6, T. R. Hayes was called into David Hayes' office to meet with David Hayes, Head Dispatcher Bob Absher, and Outhaul Manager Barry Wood. David Hayes told T. R. Hayes that the written warning he was giving him was for the April 3 incident in the parking lot. It was Holly Farms' policy not to allow solicitation at any time, or of any kind, on company property and that, if T. R. Hayes did anything further, more severe disciplinary action wold be taken against him. T. R. Hayes then was given the written warning. Nothing more was said.

A warning notice also was given to Hester. Branscome related that after learning of the warnings administered to T. R. Hayes and Hester, he called David Hayes who confirmed that such a written warning also was waiting for him, which Brangcome later received.

The reason for the warnings ag get forth in the notices given to T. R. Hayes and Branscome was ''Failure to follow instructions of Holly Farms Senior Management on 4–03–89. Further occurrences will result in more severe disciplinary action.'' In the warning given to Hester, the above first sentence was the same, but the second sentence was replaced by the following: ''This is the third written warning involving this employee. Next disciplinary action will result in discharge.''

David Hayes did not recall having said anything about solicitation during these warning interviews. When he spoke to T. R. Hayes on April 6, he told that driver that he had to give him a written warning for failure to follow the instructions of Holly Farms' senior management on April 3, 1989. He asked T. R. Hayes to sign the document and then he, too, signed. Absher recalled that Barry Foster, another driver, had attended on T. R. Hayes' behalf but that Foster had said nothing.

David Hayes testified that his discussions with Hester and Branscome, also attended by Wood and Absher, did not differ significantly from his talk with T. R. Hayes. Branscome merely had expressed displeasure that the Company had had him arrested. Hester, during his disciplinary interview, had declared that things had not been done properly that he had a right to do what he had been doing. Hayes replied that he had not made that decision but since Hester had known that the parking lot was a secured area, he should not have done that he did. Hester again protested that Hayes was wrong. The three men received copies of their warning notices.

[57] Differences in detail between the descriptions by Wyatt and Danner of the April 3 incident are not consequential.

(4) Prior practices

Hester, Dranscome, T. R. Hayes, and other employees testified that before April 3, no restrictions had been placed on off-duty employees' access to the Company's parking lots. During the Unions' campaign to organize the drivers and yardmen, which led to the March 9, 10, and 11 election for that unit, Hester related that he had spent much time in and about the transportation department parking lot. T. R. Hayes reported that, before April 3, he used to go through the same parking lot to visit the office of the workers compensation representative; that he had parked in and passed through company parking lots while patronizing cafeterias in all the complex plants and while purchasing chickens at the Company's retail store—all without incident.

Most conspicuously, however, it is undisputed that during the 3 days of the drivers-yardmen election, on March 9, 10, and 11, employees active for the Unions had set up a hospitality stand in a parking lot near the dispatchers' office where, from the back of a pickup truck, they served coffee and doughnuts to employees who either were coming in to vote or were leaving the voting place. This truck, which operated from 9 a.m. to 9 p.m. during all 3 election days, was variously manned by Hester, Danner, Wyatt, Branscome, T. R. Hayes, and others who, in addition to the refreshments, also gave out caps displaying the Teamsters logo, license plates, authorization cards, and union literature. While this hospitality stand was open, members of management and supervision, including Blake Lovette, David Hayes, John Sloop, and Gerald Lankford had stopped by, spoken to and even briefly socialized with the employees operating the stand. Wyatt testified that on March 11, at about 10 a.m., while the polls were open, Blake Lovette pulled up to the stand where Wyatt was passing out coffee and doughnuts and told Wyatt that he would be better off learning to drive on ice rather than participating in union activities. Wyatt replied that he felt that Lovette had done a good job for the Company in raising its profits and stock prices, but that Lovette just did not know anything about human relations. Lovette told Wyatt that he could see that the two of them never were going to agree, and drove off.

The record is clear that in spite of Holly Farms' knowledge that the hospitality truck was actively functioning in its parking lot near the transportation office during 3 voting March days, the Company did not interfere with its operations or suggest the stand be closed or moved. The General Counsel and the Unions argue that it only was after the Company was surprised by the Unions' success in winning that election that, for the first time, it restricted access to its parking lots by off-duty employees. The Company did that to make more difficult the Teamsters' continuing campaign to organize Holly Farms' live haul and production employees. These parties assert that some of the same employees who had been permitted access to the company parking lot to operate the hospitality stand in early March, less than a month later, were threatened with arrest, actually arrested and were given written warnings for continued union handbilling in parking lots that suddenly had become off limits.

Larry Church, in charge of safety and security at Holly Farms' Wilkesboro plant, basically confirmed the details of the April 3 arrests of Hester, Branscome, and T. R. Hayes, which occurred pursuant to warrants sworn by himself. Church contends that this was done in accordance with rules 6 and 7 of Holly Farms general post orders, issued to the entire security department. These rules, in effect for many years, were revised by Church in April 1985, since which time they have remained unchanged. The relevant rules of the general post orders are as follows:

> 6. Must keep constant alert on employee parking lot for theft, loitering, etc.
>
> 7. The distribution of noncompany literature throughout the company parking areas on windshields of vehicles or otherwise shall be strictly prohibited.

Church explained that the Company's east and west side parking lots are secured areas, enclosed by fences, and that Hester, Branscome, and Hayes were arrested when they refused company requests that they leave the western lot.

Vice President for Human Resources Lankford testified that it was he who had made the decisions concerning the arrests after being notified of the handbilling activities on the two parking lots. Lankford initially had directed security guards to tell the men to move to the entrances or to pass out their literature on the sidewalks, but not to remain on the parking lots. After receiving the guards' report that the three persons in the smaller lot south of the food service plant had left, he had sent Church to the other parking lot when the three men there had refused to leave. Lankford also summoned the police and finally ordered the arrests when the handbillers had remained adamant.

(5) Policies concerning access and distribution

Lankford explained Holly Farms' policy concerning access to its property by the general public during the first half of 1989. Persons other than employees were permitted to come onto company property, to park their vehicles in the parking lots and to have meals in the cafeterias. Members of the public also might visit someone's office for particular purposes, take guided tours of the Company's plants and purchase chickens at the store. Visitors could park in the lot and proceed to their destinations, but they could not loiter in the parking lots or in any other secured areas. Employees not on duty enjoyed the same access to company property, including its parking lots, as did outside visitors.

In 1988–1989, employees were not allowed to solicit for any purpose on company property. According to Lankford, this rule had been put into effect 5 years before when, after the Company had permitted farmers to come onto company parking lots and streets to sell apples and other produce, matters had become uncontrollable. The opened areas had become crowded with people trying to sell miscellaneous items and who had papered windshields with advertisements.

Accordingly, a decision was taken to prohibit all activities in the parking lots, including distribution of materials and the placement of anything on windshields, and to make the parking lots totally secure. This policy, since then, has been enforced with regard to both employees and outside visitors, all of whom were prohibited from soliciting, handing out literature, or from doing anything in company-owned Wilkesboro parking lots besides parking their cars and moving on. Lankford testified that the decision to secure never was published in written form or generally communicated, but that the Company merely had secured its parking lots by

use of its security personnel who communicated these rules to anyone who attempted to solicit or advertise in those places. As part of the security operation, Holly Farms had been erecting fences, which it continued to do, around the lots and had begun to use cameras transmitting video images of the lots to a centralized guard station. The use of the video camera began before the mid-February 1988 death of Holly Farms then chief executive officer, Sam Zimmermann, who had authorized the same, and the number of security guards was increased, with roving guards being assigned to go through both the plants and the parking lots.

Blake Lovette and Everett (Skipper) Solomon[58] cited unsettled property title to distinguish the small parking area where prounion employees had set up the hospitality stand during the March election from the other, more secured, completely fenced parking areas. Part of the site where the hospitality stand stood had been acquired several years before when Holly Farms, needing additional parking space at its Wilkesboro complex, had purchased a small plot for such purpose from the Duke Power Company. At about the same time, Holly Farms had taken a nonwarranty deed on a smaller adjacent parcel of land, also to be used for parking. The stand and the parked vehicles of those who operated it were spread over both adjoining parcels. The nonwarranty deed was prepared because, as the owner of the relevant plot was unknown, Holly Farms then could use the property openly and, years later, acquire title to it by adverse possession.[59] Accordingly, while no one had claimed the smaller plot, Holly Farms did not, itself, yet own the land and was concerned that someone still might claim the property.

Both the lot acquired from Duke Power and the disputed adjacent lot, gravelled over, were used for Holly Farms transportation drivers' parking and, also, for random, unassigned, and overflow parking.

The Respondents' point, as described by Blake Lovette, is that since, at the time of the March election, the Company did not have clear ownership of the entire plot of land where the hospitality stand had been set up and, as the drivers' vehicles had been parked both in the area purchased from Duke Power, which the Company owned outright, and on the title-disputed plot, the Company had not asked the drivers running the stand to leave. This was because, as Lovette explained, he could not do so if the Company did not own the land outright. He noted that the drivers had not been bothering him. Lovette also conceded that the ownership issue had not prevented Holly Farms from using that area as it had any of its other parking lots. The record also shows that, before and at the time of the March election, the area where the hospitality stand was located displayed the following sign, positioned so as to apply to both properties:

NOTICE
No trespassing
Solicitation or distribution
of materials allowed on
company property at any time

Rabon E. Roten, a Holly Farms day-shift security sergeant who has continued in that capacity under Tyson and who was present when Hester, Branscome, and T. R. Hayes were arrested, testified that, when those arrests occurred, he had not known that title to the property where the drivers had had their March election hospitality stand was in dispute. He had learned of this only well after the start of the hearing in this proceeding, and almost a year after he had replaced the above existing faded signs on that property with like signs that were easier to read.

(6) The parties' positions; discussions and conclusions

The General Counsel and Unions contend that the Respondents' actions in threatening to arrest the six above-named employees, and in causing the actual arrest of three, for handbilling on two company parking lots were discriminatory and were for breach of an unlawfully broad no-access/no-solicitation rule that Holly Farms had begun to enforce only after the Unions were successful in the March election for the drivers-yardmen unit. They assert that the rule was then maintained and enforced strictly and selectively to thwart the Unions' continued organizing campaign among the Company's live haul unit and production employees. These parties argue that Holly Farms' readiness to tolerate the drivers' hospitality stand in a company parking area for 12 hours a day during all 3 days of the March 9–11 election was a conspicuous example of the Respondents' selective enforcement of that policy. The General Counsel and Union also assert that the Company thereafter further violated the Act by discriminatorily issuing written warnings to the three employees who had been arrested for union handbilling, and by telling employee T. R. Hayes, when giving his written warning, that it was Holly Farms' policy not to allow solicitation at any time, or any kind, on company property.

The Respondents, in turn, argue that the security rules restricting access to its parking lots by off-duty employees and others had been in effect for at least 5 years; had been promulgated for reasons described above unrelated to the Unions' campaign, which included theft prevention; had been distributed for years to the security force; and that the secured status of the lots, for the most part, long had been rendered conspicuous by fencing, by guard patrols, and by posted signs. The Respondents contend that the hospitality stand was permitted during the March election because, in part, it had been set up on land to which Holly Farms did not have clear title and because, as a practical/tactical matter, it did not appear logical to initiate a confrontation with employees while a representation election was in progress.

[58] Solomon, Holly Farms division vice president, North Carolina, after the July 1989 takeover, became Tyson's regional manager, North Carolina, with basically the same duties—which included management of the Wilkesboro complex.

[59] Under the North Carolina rule, a party might achieve title to disputed realty after 7 years of open, notorious occupancy, and use.

In *Tri-County Medical Center*,[60] the Board stated the applicable rule that a no-access rule concerning off-duty employees is valid only if it:

> (1) limits access solely with the respect to the interior of the plant and other working areas; (2) is clearly disseminated to all working employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies offduty employees entry to parking lots, gates and other outside non working areas will be found invalid.

Here, as in *Tri-County Medical Center*, supra, the record shows that Holly Farms did not inform its employees of the existence of the general post orders restricting their access to the parking lots while off-duty, except, perhaps, on ad hoc bases not described in the record. Rather, Safety and Security Supervisor Church testified that rules 6 and 7 of the Company's general post orders, which governed the security guards' actions in this matter, were distributed only to members of the security department; were not published or given to nonsecurity employees and were made known to employees or outside visitors only when the security department employees enforced those rules against them. Lankford also testified that the Company's 5-year-old decision to secure the parking lots likewise was never announced to employees.

Holly Farms' application of its no-access rules against offduty employees in the present case is also invalid because the rules, as stated in item 7 of the general post orders and the erected parking lot signs, do not clearly limit access solely with respect to interior, or other work areas or as to worktime. As noted by the U.S. Court of Appeals, Third Circuit, in *NLRB v. Pizza Crust Co*., supra, an employer may not prohibit its employees from distributing union literature in nonworking areas during nonworking time absent a showing that such a ban is necessary to maintain plant discipline or production.[61] There was no showing by the Company to either effect. The Respondents did not seek to establish that, on April 3, the six off-duty employees in the two parking lots interfered with vehicular traffic, employee ingress or egress, employees at work or that they created a disturbance. The Company merely was opposed to the employees' being where they were and doing what they did.

The record also shows that in spite of the restrictions on access set forth in rule 7 of the general post orders and on the signs erected in the area, Holly Farms did not consistently enforce these restrictions, as indicated by its acceptance of the hospitality stand during the 3-day election. The Respondents' argument that it had not closed the stand because it did not have clear title to all the land where the stand and associated vehicles were located is unconvincing. Ever since acquisition, the Respondents had been using the two relevant adjacent plots as a single parking lot with no material distinction from the Respondents' other Wilkesboro complex parking lots, except as to fencing, which was a continuing project on the Respondents' property. Holly Farms had positioned the erected sign posting restrictions so as to be applicable to both plots; had graveled both parcels uniformly; and had not made known the existence of any question concerning property rights either to its employees or to its security personnel who were charged with enforcement.

Accordingly, I find that Holly Farms violated Section 8(a)(1) of the Act by repeatedly and disparately enforcing its no-access/no-solicitation rule to discourage employee union activity;[62] by promulgating and enforcing an unlawfully broad no-access/no-solicitation rule affecting its premises;[63] and by threatening employees Wyatt, Lackey, Danner, Hester, Branscome, and Hayes with arrest if they did not quit union handbilling on the Employer's premises in breach of its unlawful no-access/no-solicitation rule.[64] The Respondents violated Section 8(a)(3) and (1) of the Act by causing the arrests of Hester, Branscome, and Hayes because, in the applicable circumstances, they would not stop their handbilling;[65] and by David Hayes' issuance of written warnings to the three previously arrested employees in retaliation for their continued union activities and in enforcement of the Respondents' unlawful no-access/no-distribution rule.[66] I finally find that the Respondents also violated Section 8(a)(1) and (3) by David Hayes' April 6 statement to T. R. Hayes, when giving him the written warning, that it was Holly Farms' policy not to allow any solicitation at any time or of any kind, on company property and that, if T. R. Hayes did anything further, more severe disciplinary action would be taken against him.[67] In so concluding, I accept T. R. Hayes' account of what was said to him at the time because consistent with the Respondents' actions in this regard.[68]

2. The alleged 8(a)(1) violations affecting live haul unit and other employees—facts and conclusions

Holly Farms' live production division within the Wilkesboro complex and in outlying facilities encompassed hatcheries, feed mills, feed hauling, the growing of broilers, and the live haul department, which was responsible for catching and transporting chickens to the Wilkesboro processing plants. While the Board, in its Decision and Direction of Election in Case 11–RC–5583 found certain live operations, such as the hatcheries, to be exempt under the Act because agricultural, the Board did order an election among employees in Holly Farms' live haul department, part of that Company's live production division, which included chicken catchers and live haul drivers. The chicken catchers, after punching in at the live haul timeclock in the Wilkesboro complex, were driven to the growing areas where the broilers were raised. There, they caught and caged the chickens for transportation to the processing plant on flatbed trucks by the

[60] 222 NLRB 1089 (1976). Also see *299 Lincoln Street, Inc*., 292 NLRB 172, 187 (1988); *NLRB v. Pizza Crust Co*., 862 F.2d 49 (3d Cir. 1988), enfg. 286 NLRB 490 (1987).

[61] *Eastex, Inc. v. NLRB*, 487 U.S. 556, 570–571 (1978).

[62] *299 Lincoln Street*, supra; *Tri-County Medical Center*, supra.

[63] *299 Lincoln Street*, supra.

[64] *Roadway Package System*, 302 NLRB 961 (1991); *All American Gourmet*, 292 NLRB 1111 fn. 2 (1989); *Medical Center Hospitals*, 244 NLRB 742 (1979), enfd. 626 F.2d 862 (4th Cir. 1980).

[65] *Medical Center Hospitals*, supra.

[66] *Funk Mfg. Co*., 301 NLRB 111 (1990).

[67] Ibid.

[68] The U.S. Supreme Court's recent decision in *Lechmere, Inc. v. NLRB*, 139 LRRM 2225 (1992), which limits the access rights of nonemployee union organizers to an employer's premises for organizing activities, of course, is inapplicable here as that case did not restrict access for such purposes by the employer's employees.

live haul drivers. These drivers operated the vehicles used to move the chicken catchers and poultry between the growing farms areas and the plant. Also included as part of the ''live haul'' unit were feed mill, feed hauling and service center employees at Roaring River, North Carolina.

As noted, while the drivers-yardmen unit of the transportation department was jointly represented by the seven local unions, only one of those locals, Local 391, herein the Union, had petitioned—on February 16—for an election among the above live haul unit employees. Local 391 was unsuccessful at the July 27 election. While the Teamsters also concurrently conducted an organizational campaign among production workers, no election petition was filed as to them. What follows is consideration of Respondents' conduct during Local 391's campaign alleged to have interfered with the rights of live haul unit and other employees under Section 7 of the Act.

a. *By Charles Robert (Bob) Sebastian*

The General Counsel contends that Sebastian, then manager of the Holly Farms Wilkes hatcheries, engaged in surveillance of union meetings during 2 days. The Respondents deny both Sebastian's unlawful conduct and his supervisory status.

Hatchery division employee Terry Osborne[69] testified that on July 15, at approximately 2 p.m., as he pulled his vehicle into the Days Inn Motel parking lot in Wilkesboro to attend a meeting called by Local 391, to be conducted there by Local 391 organizer, R. W. Brown, he saw Bob Sebastian, manager of the Holly Farms Wilkes hatcheries, moved his van from a remote parking space on the Days Inn lot to a space closer to the front of the motel, passing Osborne in the process. Osborne then entered the motel to attend the session in one of the meeting rooms. About 25–30 employees also were present. When Osborne briefly looked outside the motel about a half hour later, he saw Sebastian, shirtless and wearing Bermuda shorts, seated at a poolside table facing the hall entrance to the pool area at about 50–60 feet from the Union's meeting room. Within a couple of minutes, Osborne returned to the meeting. When Osborne finally left the premises, he saw no company supervisors in the area.

Live haul driver James Phillip Church also testified that in mid-July, while he, too, was at the Days Inn to attend a union meeting, he saw Sebastian, dressed casually, pass through the motel's outside hallway between the meeting rooms. Church related that, when he spotted Sebastian, he had just come out of the conference room where his union meeting was held.[70]

Osborne related that on July 22, at about 3 p.m., he attended another union meeting at the same Days Inn.[71] When Osborne heard someone say that Sebastian was out there again, he stepped into the hall and saw Sebastian by the pool, attired in a shirt and jogging pants. Sebastian was about 20–30 feet from Osborne and was looking away from the motel. Osborne did not say anything to Sebastian.

Sebastian[72] testified that during the summer of 1989, he had continued his practice of the preceding 10–15 years of going to the Days Inn pool to relax in the sun practically every summer weekend from his home about 4–5 miles away. In 1989, as before, even while the motel had been owned by Days Inn's predecessor, Holiday Inns, he followed this custom. He had started going to those premises for entertainment when it was a Holiday Inn because on Friday and Saturday nights there was a dance band. In that earlier period, he had become friends with the Holiday Inn manager and assistant manager, who had given Sebastian and his friends access to the motel pool. However, since Days Inn took control of the motel, about 2 years before, Sebastian no longer had a relationship with the motel's management and there was no band. Nonetheless, although he kept a boat on a lake approximately 8 miles from his home, Sebastian continued to go to the Days Inn pool more than six times a month during the summers. He had been doing this for a long time, enjoyed it, and had not been prevented from continuing by Days Inn management.

Sebastian averred that during the summer of 1989, while at the Days Inn, he did not see any Holly Farms' employees; that he did not know Phillip Church; that he had seen no live haul personnel;[73] that no one from Holly Farms had asked him to go to Days Inn and report what he saw there; and that he did not write the names of anyone at that motel.

[69] Osborne, who has continued in the employ of Tyson/Holly Farms in the North Wilkesboro breeder division, reported that Local 391 had scheduled three July 15 meetings for the Days Inn facility. The hatchery division employees' meeting was set for 2 p.m.; the processing employees were to meet at 4 p.m.; and the transportation employees were scheduled for 6 p.m. As a hatchery employee, Osborne would have been excluded from the live haul unit found appropriate by the Board in Case 11–RC–5583.

[70] Church related that although he and Sebastian worked in different areas and he had not seen Sebastian exercise supervisory authority, he knew who Sebastian was, having met him occasionally over a 10-year period.

[71] On July 22, the Union again had scheduled meetings with the same groups of employees and in the same sequence as on July 15.

[72] Sebastian related that 5 supervisors and 15 hourly rated hatcheries employees, including 8 chick haulers and 7 egg haulers, reported directly to him as manager of the Respondents' Wilkes hatcheries. About 95 hourly paid employees also reported to him indirectly through the 5 supervisors. The parties stipulated at the hearing that Sebastian exercised sufficient authority over the hatcheries employees to functionally qualify him as a supervisor and an agent of the Respondents within the meaning of Sec. 2(11) and (13), respectively, of the Act. However, the Respondents contend that since Sebastian supervised only excluded agricultural hatcheries employees, he was not a supervisor and agent under the Act. While the General Counsel agrees with the above-described level of Sebastian's authority and with the functions attributed to him, the General Counsel asserts that Sebastian supervised both exempt agricultural employees and nonexempt persons who qualify as employees within the meaning of Sec. 2(3) of the Act. However, the General Counsel did not identify employees supervised by Sebastian who were nonagricultural and, therefore, nonexempt. As the Respondents argue, Sebastian may not be a supervisor within the meaning of Sec. 2(11) of the Act because he exercised authority only over individuals who were exempt under Sec. 2(3) of the Act. Nonetheless, as a member of the Respondents' management with what otherwise would be conceded supervisory-level responsibility for overseeing the Respondents' operation employing some 115 individuals, he, at least, must be considered, and I find that he was, Respondents' agent within the meaning of Sec. 2(13) of the Act.

[73] The Respondents' live haul operation in Wilkesboro was approximately 3 miles from the hatcheries. Sebastian had last worked in live haul, as a supervisor, about 20 years before.

While, as he later learned, a union meeting may have been in progress while he was at the motel, he denied having known of any such meeting at the time.

I credit Sebastian's denials that he was at the Days Inn pool on the dates in question to conduct surveillance of the union meetings that were in progress while he was there. The Days Inn is a public place and its pool could well have had an inviting appeal on hot summer days. Sebastian's testimony that his longtime use of that pool, both under Holiday Inn and Days Inn managements, is uncontradicted and, contrary to the General Counsel, there is no convincing evidence in the record that Sebastian, apart from his mere presence, engaged in conduct inconsistent with his claim of poolside relaxation. Although meetings of hatcheries workers also were conducted while Sebastian was at the motel and he might be expected to recognize them, since the Board previously had excluded hatcheries workers from the Act as exempt, I cannot in any event find that surveillance of their union activities, as described by Osborne, was prohibited under the Act. However, even if I were to find that Sebastian had been spying on the hatcheries workers' union activities, which I do not, it would be difficult to extrapolate to a further determination that he also must have been there to spy on the scheduled meetings of the live haul and transportation employees since the record contains no foundation evidence that he would have recognized them.[74] The Wilkes hatcheries, managed by Sebastian, were approximately 3 miles from the live haul operation, and Sebastian had not worked in live haul for 20 years. There is no showing that he had had any contact with the transportation employees so as to be meaningfully able to report on their union activities and Sebastian's option of using his boat does not translate into a legal obligation to spend his summers in it. Accordingly, I find that Sebastian, as the Respondents' agent, did not violate Section 8(a)(1) of the Act by conducting surveillance of the Respondents' employees during 2 days in July.

b. *By Ray Lovette*

Live haul drivers Dennis G. Dimmette, Burl Parsons, Joseph Phillips, and James Phillip Church testified concerning their respective interviews with Live Haul Department Manager Jay Lovette,[75] in late February and early March,[76] when Lovette arranged to meet individually with each driver in Supervisor Tommy Eller's office. Eller did not attend these interviews.

Parsons testified that, on February 16, Ray Lovette called him into Eller's office and asked how Parsons felt about the Union. Parsons replied that the men needed something to help them; they could not make it on a 4-day workweek. Lovette asked how the Union could help the men. It couldn't get them more time. Parsons answered that it might get them a wage increase. Parsons related that, until then, he had not worn union insignia or otherwise revealed his union sympathies.

Dennis G. Dimmette related that his interview with Ray Lovette occurred in early March. Lovette asked how Dimmette felt about the Union; if it had helped him. When Dimmette answered that the Union already had helped him, Lovette wanted to know how. Dimmette replied that it already had helped him because Lovette, for the first time, was showing enough interest to ask questions about his problems at work. In response to Lovette's inquiry as to what Dimmette's problems were, Dimmette told him that his biggest problem was that he only was working 4 days a week and that it was hard to live on the money he was taking home. Lovette reassured Dinmette that he knew this was a problem, and that he was going to try to get the employees more time. Lovette told Dimmette that Holly Farms did not want a union.

Dimmette related that from 2 weeks to a month after this conversation with Ray Lovette, the live haul employees began to receive 5 workdays per week.

Joseph Phillips testified that, on about March l, after Ray Lovette had gathered together a group of live haul drivers who had just completed their shifts, including himself, and had taken each driver, separately, into Supervisor Eller's office. When Phillips was reached, Lovette asked how Phillips felt about the Union. Phillips replied that he felt very strongly. Lovette asked why. What did Phillips feel that the Union could do for him? Phillips told Lovette that he did not know. The Union had offered to help; Holly Farms had not. Lovette then told Phillips that the Union would not be at Holly Farms and that anyone caught distributing literature on the Company's property would be dismissed. Then, because Phillips was displeased about insurance coverage, the two men spoke for about 20 minutes more about the insurance plan.

James Phillip Church averred that Ray Lovette, in an upstairs area in the live haul building, told him that he knew that Church worked for Local 391. When Church asked how Lovette knew this, he was told that Lovette had a letter on his desk stating that Church worked for the Union.[77] Lovette did not answer Church's request to see the letter, but asked what was the problem. Church, too, told Lovette that the employees did not get enough worktime (with only 4 workdays a week) and did not make enough money. Lovette stated that he was going to try to get the employees 5 workdays a week

[74] In addition, Osborne testified that by the time the July 15 meeting he had attended was ended, Sebastian was not in sight.

[75] Lovette's duties as live haul manager, Wilkesboro, included supervising the movement of poultry from the grow-out farms under contract to the Respondents to the processing plant in the Wilkesboro complex, and entailed general supervision of the chicken catching crews, consisting, as noted, of chicken catchers and live haul drivers. Lovette, with the assistance of 2 superintendents and 12 supervisors, oversaw the work of approximately 165 employees.

Live haul drivers in the live production department were distinct from the long-distance and local drivers within the transportation division. Live haul drivers, unlike the transportation drivers, did not make deliveries to customers, but merely transported the chicken catchers to the grow-out farms and, operating flatbed trucks, moved the caged chickens to the processing plants. On occasion during the summers, live haul drivers not otherwise occupied, might be assigned to water tank trucks to spray-cook chicken houses and chickens.

[76] Although Church testified that his talk with Lovette took place in May, I conclude from the weight of the evidence that it had occurred during the first week of April.

[77] Church testified that his organizing efforts for the Union among the live haul employees had been quite open. He had handbilled, mostly in the parking lot, and had given out authorization cards. To his knowledge, however, no supervisor had been around when he was handbilling.

and more money. By the end of May or the start of June, the live haul employees began to work 5-day workweeks.

Ray Lovette agreed that, during the first week of April, he did meet with all 36 Holly Farms live haul drivers, including Dimmette, Parsons, Phillips, and Church, in a series of one-on-one interviews in Eller's office. These had resulted from a roundtable conversation chaired by Holly Farms' vice president for North Carolina operations, Everett (Skipper) Solomon, and joined by Lovette; by the Holly Farms' vice president for human resources, Lankford; and by Lovette's immediate superior, Samuel S. Whittington, live production manager, Wilkesboro. Those present agreed with Solomon that since the employees had felt that they needed a union, it was necessary to talk to them to find out what the Company had been doing wrong. Accordingly, it was decided to meet with the employees for that purpose and to try to correct any problems uncovered. The conference between Lovette, Solomon, and the other supervisors where it had been decided to conduct these interviews had taken place during a hiatus period, shortly after March 27, when the February 16 petition in Case 11–RC–5583 had been dismissed, but before April 28, when it was reinstated. Lovette's interviews with the drivers were held during that same interval. Accordingly, the Respondents argue, that when Lovette met individually with the live haul drivers during the first week in April, company officials had reason to believe that the dismissed representation case involving live haul employees was permanently behind them and that they, again, could deal with their employees.

Lovette explained that in his meetings with the drivers, he merely followed instructions from Solomon, Lankford, and Whittington.

During these sessions, Lovette told each of the interviewees that the Company wanted to meet with all the drivers to learn why they thought they needed a union; Holly Farms wanted to correct anything it had been doing wrong. Lovette then asked each what the Company had been doing wrong.

Lovette recalled that his lengthiest conversation in the series was with Phillips, who long had been with him and was his friend. Phillips complained that neither he nor the other live haul drivers were getting enough worktime to make a living and that, because of low earnings, Phillips had been unable to obtain a loan for a desired house. This shortness of worktime and money also was echoed by others as their principal concern. Lovette explained that live haul drivers had been working the brief 4-day workweeks because of a shortage of live chickens. Lovette committed to the drivers that he would try to get them more time and money by reducing the size of each work crew through attrition. Accordingly, he would not replace department crewmembers until each of the 36 12-member chicken catching crews was downsized by 1 employee.

Lovette testified that he had told the same things to Parsons as to the other live haul drivers during their interviews, but that he could not recall what Parsons had said in return. Lovette denied ever having spoken to Phillips or to any other employee about handbilling. However, Lovette insisted that he did keep his promise to get the drivers more work through attrition and did not replace those who left the Company's employ until about 12 jobs were eliminated. This process, which took until May, then enabled him, during most weeks, to increase the number of weekly workdays from 4 to 5 for the remaining employees. However, the 5-day workweek never became definite because employees were kept off the job when the slaughter rate was reduced. Nonetheless, as the Company's business had been good during the second half of that year, work hours continued to increase after May.

Except for denying that he had spoken to Phillips or to other employees about handbilling, Ray Lovette did not dispute the four drivers' descriptions of their interviews with him. While agreeing that he had promised to remedy employee complaints about the inadequate pay resulting from the short 4-day workweeks, Lovette did not go into the details of his meetings with the employees. Lovette testified that he had chosen to talk to the drivers rather than the other live haul employees because he believed that they were more interested in the Union and that the Union was more interested in them. I, therefore, credit the essentially uncontradicted accounts of the four drivers as to what Lovette told them during these meetings, including Phillips' testimony, denied by Lovette, that Lovette had informed him that anyone caught distributing literature on company property would be dismissed. Lovette did not deny having engaged in a variety of other unlawful conduct during these interviews and, as found above, during the same week when, according to Lovette's testimony, he spoke to the live haul drivers, the Respondents had threatened the arrest of six employees for union handbilling on company property; had caused the arrest of three of those employees for persisting in such conduct; and had given the three arrested employees written warnings, threatening one with discharge. At the same time, Lankford, in a speech to live haul employees, had mentioned the three arrests while prohibiting union handbilling. Against this background, in crediting Phillips, it appears that Lovette, in telling Phillips that anyone caught union handbilling would be discharged, was merely expressing company policy.

I also accept the General Counsel's contention that Dimmette, Phillips, and Parsons were unlawfully interrogated concerning their union sympathies by Lovette during the above-described meetings.[78] While Dimmette was the most active union supporter of the three in that he posted union literature on bulletin boards, the record does not show that this, or any of his other union activities, had been known to management. Parsons and Phillips, too, had been overt union supporters when they were asked how they felt about the Union. While, as described by Lovette, he and Phillips might have had a cordial, or even a friendly relationship, this was not reflected in their interview where Phillips as found above, was warned, in effect, that he and others could be discharged if caught distributing union literature on company premises.[79] Noting, too, that these interviews were privately conducted in a recognized place of authority, a supervisor's office, I conclude that the Respondents serially violated Section 8(a)(1) of the Act by Lovette's admitted consecutive interrogations during 36 interviews with live haul drivers as to how these employees fell about the Union. While Church,

[78] *Rossmore House*, 269 NLRB 1166 (1984), enfd. 706 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

[79] See *Harrison Steel Castings Co*., 293 NLRB at 1168; *Colorado-Ute Electric Assn*., supra.

too, was similarly interrogated by Lovette in like setting, I find that such conduct was not unlawful since Church previously had been named by the union in correspondence to the Employer as a member of its in-plant organizing committee. Church also openly had engaged in union activities and his prounion stance was generally known.

Having credited the employees' accounts of their interviews by Lovette,[80] I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's solicitations of and promises to remedy the grievances of Dimmette, Church, and other employees, and by actually remedying these grievances.[81] In agreement with the General Counsel, I further find that the Respondents also violated Section 8(a)(1) of the Act by Lovette's statements to Phillips that a union would not be at Holly Farms, which expressed the futility of supporting the Union; and by Lovette's threat to Phillips to discharge anyone caught union handbilling on company premises. Contrary to the General Counsel, I find no evidence that Lovette had said anything to Parsons to the effect that it would be futile for him to support a union.

I am not persuaded by the Respondents' argument that, since the arrests of the employees for union handbilling, the threatened arrests, the written warnings, Ray Lovette's interviews with the live haul drivers, and other disputed conduct all had occurred during the period when the representation election petition in Case 11–RC–5583 had been dismissed and not yet reinstated, their conduct during that interval should not be considered in assessing violations of the Act or in support of objections to the later election in that case. This is argued on the ground that since under *Goodyear Tire Co*., supra, as described above, the critical period before an election commenced with the filing of the petition, the absence of an effective petition between that petition's dismissal and reinstatement had interrupted that critical period and lulled the Respondents into a good-faith belief that the representation question had ended and that they could resume business as usual.

These arguments are unconvincing because Respondents, in any event, should have been restrained. The lawfulness of the Respondents' activities under the Act is not dependent on whether an election petition has been filed, or remains current, but on whether the conduct alleged as unlawful in any way coerced, restrained, or interfered with employees in the exercise of their rights under Section 7 of the Act. As to whether such disputed conduct, occurring while the petition was in limbo and subject to restoration, could be considered in support of election objections, that situation is somewhat analogous to that which obtains when an employer, having won a representation election, acts unlawfully during the period when timely objections to the election still could be filed. In either case, there is an indeterminate procedural hiatus subject to change either, as here, by a motion for reconsideration, or in the analogy, by the filing of objections. In either situation, the employer acts at its peril. An employer's unlawful conduct occurring between the time it was successful in the election and when objections were filed has been found to have both violated the Act and to have served as grounds for setting aside an election.[82]

In the present matter, the Respondents' activities during the interval between dismissal and reinstatement of the election petition merely continued their strong, often unlawfully conducted, campaign to defeat the Union's organizational drive at their Wilkesboro complex. Such efforts started before the dismissal of that petition and were carried forward after that petition was reinstated. Even the longer workweek Lovette, in April, promised to get the drivers was not delivered until May, after the petition was reinstated. Accordingly, here, too, the Respondents acted at their peril and I conclude that unlawful activities found to have occurred during the above hiatus period should be considered in determining whether the Act has been violated and whether the election in Case 11–RC–5583 should be set aside.

c. *By A. Gerald Lankford; Barbara Mathis*

Live haul driver Dimmette testified that in late April, around the 8 a.m. conclusion of their shift, he and a group of about 40 night-shift live haul employees were summoned by their supervisors to attend a meeting in the cafeteria annex at Wilkesboro, conducted by then Holly Farms vice president for human resources, A. Gerald Lankford. According to Dimmette, Lankford told the employees that if the Union came in at Holly Farms, and if there was a strike, the Company could haul its chickens to other plants for processing or it could close down the Wilkesboro operation and hire other workers in their place.

Production employee Paula Dowd[83] testified that, in late March, she attended a meeting of about 80 to 100 employees conducted by Lankford in the cafeteria annex of the Wilkesboro fresh poultry plant. Dowd related that she had not paid too much attention to what was said until Lankford, late in the meeting, told the group that the Company would relocate the plant to Virginia or Texas if it did not meet the Union's demands. While Lankford principally read his statement to the employees from a prepared text, Dowd does not recall with certainty whether he read the above declaration or delivered it extemporaneously.[84]

Live haul driver James Phillip Church related that in late June, he and 15 to 20 other live haul department employ-

[80] Since Lovette was the witness most certain as to when these interviews occurred, I accept his testimony that they took place during the first week of April.

[81] *S. E. Nichols, Inc*., 284 NLRB 556, 574–575 (1987).

[82] See *Premier Maintenance*, 282 NLRB 10, 11 fn. 4, 16 (1986).

[83] When she testified, Dowd already had quit her job with the Respondents. From January 1985 to August 1989, Dowd had worked in the Respondents' main processing plant.

[84] Dowd also testified without contradiction that, on April 3, she was approached by a Respondents' security guard while walking to her car after leaving work, while holding some union authorization cards in her hand for distribution. The guard told Dowd that she need not have those (cards) on company premises. She said okay. The guard told Dowd that if she did not believe him, some of the truckers had been arrested earlier. Dowd repeated okay and left. Noting that the guard's admonition to Dowd was consistent with the Respondents' policy, manifested that same day, of using the security guards to threaten and to assist in the arrests of employees for distributing union literature in company parking lots during nonworktime, I find that when the guard spoke to Dowd, he was acting as a Respondents' agent. *Hudson Oxygen Therapy Sales Co*., 264 NLRB 61, 70–71 (1982). I further find that the Respondents violated Sec. 8(a)(1) of the Act by the guard's implied threat that Dowd, too, might be arrested if she gave out the cards on the Respondents' property.

ees—chicken catchers and live haul drivers—were at a meeting presided over by Lankford and attended by Barbara Mathis, personnel manager of Holly Farms' Wilkesboro complex. Church testified that Lankford opened the session by asking if the employees had any questions about the coming Tyson buyout of Holly Farms. One employee asked about Tyson's insurance coverage. During the meeting, Lankford asked if there were any rumors about the Union. Church testified that when no one responded, Mathis interjected that, ''If the union wins the election, we'll know who you are and who voted because we'll see the cards. But if the company wing, we'll hear no more about it,'' ending the meeting. However, earlier during that session, Lankford also had told the employees, ''No more handbilling. The Company had had three previous arrests and did not need any more.''

Lankford testified that from late March to July, he met with various groups of company employees during which he read a series of prepared speeches directed at the Union's campaign. The speech, dated April 12, heard by Dimmette and other live haul workers, contained the following language relevant to Lankford's explanation to the employees why the Union could not force the Company to do anything by calling a strike:

> There are good reasons why this is so. For example, we don't think it would ever come to that, but we have the numbers to show that we could close down every operation we have in Wilkes County, North Carolina, and continue to meet all our customer obligations. I'm not suggesting that we would voluntarily close down any operation in Wilkes County or any where else, but if these operations could be closed by a strike, we could sit that out indefinitely if we had to.

Lankford related that Dowd and others had heard him read an address, dated March 29, delivered to groups of the Company's food service and roast chicken plant employees during a series of meetings in the cafeteria annex of the Wilkesboro fresh poultry plant. These groups which ranged in size from 75 to 200 employees, did not include live haul unit employees. In this speech, belittling the impact of any possible strike in the event of unionization, Lankford read the following germane to what Dowd recalled as having heard:

> A determination also has been made that all of the poultry killed and processed in the Wilkesboro plant can easily be killed and processed in our other plants in Virginia, North Carolina and Texas. We would not loge *any* production to speak of even if we could not operate the Wilkesboro plant.
>
> As far as this plant right here is concerned, our Texas quick-to-fix plant is ready and able on a moment's notice to take over this production responsibility.
>
> I am simply telling it like it is.

In describing what might happen in the event of a union-called work stoppage, Lankford then indicated that the Company would move its production processes from Wilkesboro to its other facilities in Virginia and Texas. No questions were asked by employees during any of the meetings where this address was given. Lankford also denied having added anything beyond what was written and described above.

Lankford also gave a different prepared address to live production employees and to employees at the feed mill, bulk feed, and to nonlive production employees at the Roaring River Service Center on June 29 and 30—which was heard by Church and others. While the text of this address describes an employer's right to replace economic strikers, should such a stoppage occur, the written text of the speech does not refer to handbilling or to the arrest of employees for doing so on company property and Lankford denied that arrests for handbilling or related consequences were mentioned during any question or answer session. Lankford also recalled that Mathis had attended most of the June meetings when that last speech was given and that he was certain that Mathis had not stated that the Company would know how the employees had voted.

I accept Lankford's testimony that Personnel Manager Mathis did not make her above statement that the Company would know the way employees had voted if the Union should be selected at one of his meeting since Live Haul Manager Ray Lovette testified that she made such a comment, not at a session conducted by Lankford, but during a talk to employees given by Skipper Solomon. In this regard, Ray Lovette testified that he and Mathis were present at a June meeting of employees conducted by Everett (Skipper) Solomon, then vice president for Holly Farms' North Carolina operations. According to Lovette, Mathis had attended all such meetings held by Solomon, but had said nothing except to answer questions directed to her. However, at a June meeting, before the representation election, an employee asked if anyone would know how the employees had voted. Solomon replied that no one would know, but Mathis interjected that the Company would know, when the Union sent in their requests for dues checkoffs. Mathis complied with Lovette's signal to hush. Since Lovette's testimony concerning Mathis substantially corroborated that of Church, and, noting that Mathis did not attempt to deny this incident although called to the stand by the Respondents more than once. I find that that the Respondents violated Section 8(a)(1) of the Act by Mathis' above statement which threatened employees with unspecified reprisals if they supported the Union and which threatened employees that their vote, if for the Union, would be known to the Respondents' management.[85]

While Ray Lovette also corroborated Lankford's testimony that he had not deviated from the written text of his speech and, therefore, did not tell the employees, in effect, that there would be no more handbilling, that three employees had been arrested for union handbilling on company property and that the Company did not need any more arrests, nonetheless, credit Church's testimony that Lankford did make the statement to the above effect. Lankford, by his own testimony, that same week had been the principal force behind those arrests and the threatened arrests. Having taken that much trouble, it would have been quite consistent for Lankford to have tried to maximize the effects of those efforts by making additional employees aware of hazards of engaging in that type of union activity on company property.

[85] *S. E. Nichols, Inc.*, 284 NLRB 556, 577 (1987).

I, therefore, find that the Respondents violated Section 8(a)(1) of the Act by Lankford's above statement to employees which, impliedly, threatened employees with arrest if they engaged in union handbilling on company property in breach of the Respondent's unlawfully broad no-access/no-distribution rule.

As to the prepared text of Lankford's March 29 speech described above, his remarks, in a different, less coercive atmosphere, might not have been violative of the Act since it is not necessarily unlawful for an employer's representative, during a union campaign, to tell employees that, if the Union is selected and calls a strike to support its bargaining demands, the Employer could continue to operate by relocating the struck operations to its other facilities, or by replacing its striking employees.[86] Since Lankford, in his talks, did not tell employees that relocation from Wilkesboro would be voluntary or inevitable but merely had announced, in effect, that, should a strike occur, relocation was a possibility and that the Company could sit out a strike indefinitely, I conclude that Lankford's references to a strike and its consequences, in other circumstances, could be construed as predictions of the possible occurrence of events outside the Company's control and not threats of reprisal based on the employer's own volition. However, Lankford's words, in the present case, when viewed against the background of the Respondents' other unlawful conduct found herein, including Lankford's own activities, had a tendency to coerce employees. I, therefore, find that the Respondents violated Section 8(a)(1) of the Act by his March 29 speech threatening employees with relocation of their work and attendant loss of their jobs if they selected the Union.[87]

d. *By Samuel S. Whittington*

Live haul driver James Phillip Church testified that on about April 28, he was summoned to meet with Live Production Manager Samuel S. Whittington and Live Haul Manager Ray Lovette. Whittington accused Church of harassing a couple of employees. Church denied having done so and asked for the names of the complaining employees, which Whittington declined to provide. Church, maintaining his innocence, also refused to comply with Lovette's request that he sign a personnel change of status (warning) form containing the following reason for the discipline:

> It has been brought to my attention by other employees that you have been harassing them here at work. This is to inform you and warn you that we will not allow you to harass other employees on any subject. If it happens again you will be terminated.

Although Church persisted in his refusal to sign the above warning, it finally was signed by Whittington as department head and by Lovette as a supervisor. Church testified that Whittington told him during that interview, after he had refused to sign the warning, that the Company would forget about it that time, but that if such conduct ever came to Whittington's attention again, Church would be terminated.

Church further testified that, during that meeting, Church told Whittington that he had been handbilling employees. Whittington replied that Church could be fired for union activities.

Ray Lovette testified that the employees assertedly harassed by Church were two other live haul drivers, Eddie Dean Brown and Johnny Huffman, whom Lovette described as antiunion. While Lovette, on April 27, was in the superintendent's office while others also were present, Eddie Brown had come in and announced that he had been harassed. Lovette testified that he waited until Brown was alone and asked what had happened. Brown reported that ''they'' had threatened to beat the ''hell'' out of him, identifying ''they'' as Church and three others.[88] Brown told Lovette that these individuals had threatened him at the plant and had called him at home, telling him that he should quit ''bringing [the Company] any information.'' If he continued, they were going to beat the ''hell'' out of him. Brown also related to Lovette that Church had threatened him in the break area about 2 days before.

At around the same time, Johnny Huffman, who had been away from work for 3 days, sent word to Lovette by Huffman's son, also employed at Holly Farms, that ''they'' had told him not to come to work. Huffman identified Phillip Church as one of these offenders. When Huffman returned to work after his absence, he sent a message to Lovette, again through his son, that Lovette should not speak to him.

Accordingly, Lovette stayed away from Huffman for 1 to 2 days after his return and then spoke to Huffman in private. Huffman volunteered to Lovette that he was opposed to the Union and had been suggesting to employees in the break area that they withdraw their support for the Union. He told Lovette that Church and the others had threatened him and had threatened to harm his wife, also employed by Holly Farms. He was afraid for himself and to have his wife drive to work. This had caused Huffman to change his schedule by having Eddie Brown drive his car home while Huffman waited at the plant until his wife's shift ended. They then drove home in her car.

There is a conflict between Lovette's testimony and that of Whittington as to what Lovette told Whittington when, on April 27, Lovette relayed these asserted complaints to Whittington as his immediate supervisor. Lovette testified that he had passed on to Whittington Huffman's account that Church and three others had threatened to ''beat the hell'' out of him and that he was afraid to come to work and to talk to Lovette. Lovette informed Whittington that Eddie Brown also had told him that Church and three others had threatened to beat him up and that he, too, was afraid. Both men had been threatened at work and over the telephone. Except for identifying Church, neither Huffman nor Brown would say who the others were who had threatened them.

Whittington, however, described Lovette's April 27 report to him in less dramatic terms. Whittington testified that when

[86] *Baton Rouge General Hospital*, 283 NLRB 192, 210 (1987); *Salvation Army Williams Memorial Residence*, 293 NLRB at 955, 963.

[87] *Harrison Steel Castings Co.*, 293 NLRB at 1159. As the disclaimer of intent to voluntarily relocate, contained in his April 12 speech, made that address less menacing and the threat of relocation less patent, I find that Lankford did not violate the Act by that address.

[88] Brown, Huffman, and Church all reported to Lovette through their supervisors. According to Lovette, although he asked them to do so, Brown and Huffman would name only Church, but not the others described as having menaced them.

Lovette had come to his office, he merely stated that two live haul employees, Eddie and Johnny, had come to him on separate occasions to complain that Phillip Church had been harassing them for not supporting the Union and had told them that it would be in their interest to switch sides and to stop supporting the Company. These men did not feel that they should have to contend with this. Whittington asked if these employees would be willing to relate again what had taken place. When Lovette said that they would, Whittington told Lovette to have Church come to his office. Whittington testified that, until Lovette had told him of Huffman's activities, he had not known that Huffman had been going around the plant attempting to encourage employees not to support the Union. Whittington's testimony, contrary to Lovette, that he, in effect, was told that Church had harassed the two men rather than threatened violence is reflected in the language of the warning he gave to Church which merely refers generally to harassment.

Lovette, essentially corroborated by Whittington, testified that Whittington began the April 28 meeting by repeating to Church what Lovette had told him about Church's having harassed the two unnamed employees. When Church denied the charges, Whittington told him that he was going to write him up on a warning slip and that, if this happened again, Church would be discharged. Church, however, refused to sign the warning form, as requested, and asked who the two employees were. Whittington replied that he was not going to tell him. As Church left, he said he knew who they were—that damned Eddie and Johnny. Nothing was said to Church during that meeting about handbilling or other union activities in which Church might have been engaged. Since that warning, Church, whom Whittington described as a satisfactory worker, has not received any further discipline.

Lovette, however, became inconsistent on cross-examination. When Lovette assertedly first reported Church's asserted harassment of Huffman and Brown to Whittington, Huffman had not yet stayed home from work for the 3 days and was not yet aware that his wife had been threatened. Lovette also never learned whether Church had played any role in threatening Huffman and it was only after, not before, he had spoken to Whittington on April 27 that Lovette had learned that two individuals besides Church had threatened Brown. Whittington, before issuing the warning to Church on April 28, had not personally investigated the complaints of Brown and Huffman but had relied completely on what was said to him by Lovette. In addition, Eddie Dean Brown, called as a witness by the General Counsel, testified that when, in late April or early May, Lovette had asked him if Phillip Church had been harassing him, he had said no, ending the conversation.

Noting the inconsistencies between Lovette and Whittington as to what Lovette had reported about Church on April 27; that Lovette's testimony as to what he, personally, had been aware of concerning Church's conduct when he reported to Whittington was self-contradictory; that some of what Lovette originally was to have charged Church with having done on April 27 well could not have been known to him by that date; and that Eddie Brown, an alleged harassment target, had directly contradicted Lovette's testimony, I credit Church's account of his April 28 meeting with Whittington and Lovette and conclude that the Respondents violated Section 8(a)(1) of the Act by orally threatening Church with the loss of his job if he continued his union handbilling. I further find that the written warning, also threatening discharge, was discriminatorily issued to Church because of his union activities, in violation of Section 8(a)(1) and (3) of the Act. In so concluding, I find no credible evidence that Church had harassed other employees to coerce them to stop working against the Union.

e. *Union insignia*

Michael Sturgill, a live haul employee who had been with Holly Farms for about 4 years, testified that, while seeking regular assignment as a live haul driver, in mid-July[89] he wore at work a hat with the union insignia on it. About 10 minutes after he finished his shift, certain supervisors told him that they wanted to look at the hat and he laid it down on a vending machine. Ray Lovette called to Sturgill that if he was going to wear the hat, he should get it and get out the door. Sturgill picked up his hat and left.

Sturgill further testified that when he finished work on the next day David Minton, a superintendent in the live haul department, told him that he had jeopardized his career by wearing that hat. Sturgill was not wearing a union hat when Minton spoke to him.

Sturgill explained that when these incidents occurred, he basically worked as a chicken catcher, while aspiring to a permanent assignment as a live haul driver. At the time, he also filled in for absent live haul drivers, while waiting for a vacancy to develop. By the time of the hearing, Sturgill had become a live haul driver.

Sturgill agreed with Lovette's testimony that, from April through July, many Teamsters hats were passed out and, as Tyson caps also were available, many employees wore one or the other. Both were baseball-type caps.

Lovette recalled that in late June, he did speak to Sturgill in the break area. While the shifts were changing, Lovette saw Sturgill wearing a baseball cap, standing with some other individuals near the water cooler. Sturgill, as Lovette approached, pulled off the cap and stuck it in his shirt. Lovette related that he had told Sturgill that if he was going to wear that Teamsters cap, he should have enough guts to keep it on and not to jerk it off and hide it in his shirt when he saw Lovette coming. Neither said anything else. Lovette denied having told Sturgill or any other employee that if he was going to wear the Teamsters cap to get it on and to get out of the door. Lovette explained that what he, in effect, had told Sturgill was that he did not have to hide his union hat. Lovette had not been aware of Sturgill's affinity for the Union and, as noted, many employees had been wearing union caps when he spoke to Sturgill.

Minton denied that he had spoken to Sturgill about his wearing a union cap, although he occasionally had seen Sturgill do so, and specifically denied ever having told Sturgill that wearing the union cap could affect his driving career, or words to that effect. Minton related that when the above incident was to have occurred, at the end of Sturgill's shift, there was little overlap between his schedule and Sturgill's because they worked different hours.

It is not necessary to precisely resolve the details of any evidentiary conflict between what Lovette had said to

[89] As noted, the representation election for the live haul unit was held on July 27.

Sturgill about his wearing a union hat because Lovette's own account of that incident indicated at least as much hostility as was described by Sturgill. A chilling effect on Sturgill would have resulted in either case. Contrary to Lovette's assessment, his statement to Sturgill, in the presence of others, that he should have the guts to keep the union hat on and not to pull it off and hide it when he saw Lovette coming, was no bland reassurance to Sturgill of his right to wear such a hat, but was a strong expression of displeasure by the head of the department in which Sturgill then was seeking a better job, and was tantamount to prohibition. The harshness of Lovette's rebuke, even as he described it, was illustrated by his having publicly questioned Sturgill's courage. Either Sturgill's version or that of Lovette would have the inhibiting effect asserted by the General Counsel.

In the hostile antiunion atmosphere that existed, I credit Sturgill's further testimony concerning his encounter with Minton, who, as a live haul superintendent, reported directly to Lovette and which furthered Lovette's purpose. In so doing, I note that Sturgill's credibility is enhanced by the risk taken in testifying against the Respondents' interest while he still was employed by them.[90]

In finding that the two incidents violated the Act, I note that while other employees also then wore union caps on the Respondents' premises, Sturgill's situation at the time was particularly sensitive because he then was hoping to receive an appointment as a regular live haul driver. In this, he was vulnerable to the pressures described because the chicken catching work which Sturgill then was seeking to escape was difficult and unpleasant. As described, this assignment involved going to the farms where the chickens were raised where, under cover of darkness, he and the other chicken catchers would continuously catch chickens with their hands and cage them during shifts of indeterminate duration, which continued until the task was completed. The live haul drivers, whose ranks Sturgill then hoped to join, did not themselves catch chickens but merely operated the vehicles that transported the crews, the caged chickens, and any other relevant equipment. While, arguably, the quality of Sturgill's life could have been materially improved by advancement from chicken catcher to live haul driver, it is unlikely that he could have received such a position over Lovette's objection.

The Board has held that when an employer restricts its employees' right to wear union insignia at work, it is the Employer's burden to establish that special circumstances exist which make the rule necessary, such as in order to maintain production or to ensure safety.[91] Here, both incidents occurred after Sturgill had finished work and the Respondents have made no such showing.

Accordingly, I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's admitted conduct which effectivey prohibited the wearing of union insignia, and by Minton's threat of retaliation for wearing such insignia.[92]

[90] See *Rodeway Inn of Las Vegas*, 252 NLRB 344, 346 (1980); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

[91] *Brunswick Food & Drug*, 284 NLRB 663, 684 (1987).

[92] *Pak-More Mfg. Co.*, 241 NLRB 801, 803 (1979).

f. *By Dean Grimes*

Live haul employee Clyde Lunsford[93] testified that on July 24, 3 days before the representation election, he was operating a forklift at one of the chicken farms when his supervisor, Dean Grimes, mounted the side of his forklift and told Lunsford that (live haul driver) Phillip Church probably would be fired if the Union did not get in.

Grimes, in turn, did not recall having spoken to Lunsford about the Union in 1989 and, although he regularly got onto Lunsford's loader to tell him what he wanted done, Grimes denied having told Lunsford that Church would be fired if the Union did not get in.

While, again, in a one-on-one situation, the credibility issues are not free from doubt, particularly where the alleged incident involves a supervisor who was not party to any other alleged unlawful conduct, I, nonetheless, credit Lunsford. In so doing, I note that Lunsford was a longtime employee of the Respondents who, when he testified, was still in the Respondent's employ under Grimes' supervision. I, therefore, find that Lunsford's credibility was enhanced by his willingness to jeopardize his economic interest to testify against his employer.[94] I further note that Phillip Church's prounion activities were well known to management, including to Grimes, and that Church had been the target of other Respondents' unfair labor practices, including coercive interrogation, threats, and an unlawful written warning. It also has been found above that Ray Lovette, in April, had unlawfully solicited grievances from Church, which, as promised, he had remedied.

For the above reasons, including that Grimes' threat described by Lunsford was consistent with the Respondents' pattern of union animus directed, in good part, against Phillip Church, I conclude that the Respondents violated Section 8(a)(l) of the Act by Grimes' statement to Lunsford to the effect that Church would lose his job if the employees did not select the Union.

g. *Raymond (Bob) Johnson*

Packing department employee Geneva Moore Tilley, employed in the Wilkesboro main plant's fresh processing operation, testified that, on November 9, she and another employee, Phyllis Roberts, were handbilling for the Union outside the Respondents' Convenience Foods facility,[95] located just across a company street from the main processing plant. From where they stood on the parking lot sidewalk, about 20 to 25 feet from a stairway leading to a platformed entryway, Tilley saw Supervisor Raymond (Bob) Johnson[96] standing on that platform with three other unidentified men. Tilley heard Johnson say to one of the men, ''Well, here comes the Teamsters Union again, handbilling.'' Tilley related that she looked at Johnson but continued to pass out handbills. Johnson then told the man, ''Yes, sir, here they are again for

[93] Lunsford, who intermittently has worked for Holly Farms for about 25 years, basically running a loader, still was employed by the Respondents at the time of the hearing.

[94] *Rodeway Inn of Las Vegas*, supra; *Gold Standard Enterprises*, supra.

[95] Convenience Foods, a colloquialism for the Tyson Food Service plant, prepares frozen and fast foods for institutional use.

[96] Johnson, a Convenience Foods supervisor, had held his position for about 3 years at the time of the hearing.

Teamsters Union 391. They should all be fired. If I were to catch any of my employees handbilling or even talking about the Teamsters Union, I would fire them or see to it that they would get fired.''

Tilley asked if Phyllis Roberts had heard what Johnson had said, but Roberts replied that she had not, having then been talking to one of the employees. The two women then left the area.

Tilley previously had not known Johnson, learning his name only later, but recognized him as a supervisor and the other men as Convenience Foods employees by their respective uniforms. Holly Farms' supervisors, as did Johnson, wore white jackets and navy blue trousers.

Johnson denied both knowing Tilley and having made the anti-Teamsters remarks threatening discharge attributed to him by Tilley. Johnson knew Wilma Wagner and Phyllis Roberts, employees who, he related, more frequently had given out union literature near the foot of the platform where he had stood. An entrance atop the platform opened to the Convenience Foods plant where he worked. Johnson explained that his duties required that he be on the platform each day. After he and another supervisor punched out the timecards for some 100 employees at the end of their shift—at around 3:15 p.m.—he was responsible for checking the breakroom, the bathroom areas, and the plant exterior to ensure that there was no interruption in the flow of traffic and that those areas were clean. Accordingly, barring special circumstances, Johnson was on that platform almost every afternoon at that time to check the outside areas and, also, to talk to his people as they left to hear their problems and answer their questions. Normally, one to three other men would join him there. These were employees who either were leaving and waiting for a ride, or who had arrived early for work.

Johnson recalled that when Wagner and Roberts first began to give out union literature near the platform stairs, Roberts had told him that he should go back inside because he was intimidating the people who were coming by and, in effect, was interfering with her distributions. Johnson replied that he did not feel that he was doing the intimidating; she was the one who was acting differently by being out there, because he was there every day. Roberts, according to Johnson, in so commenting did not refer to anything Johnson had said to any employee. He reiterated his denial of having made the statements described by Tilley.

The general evidence surrounding this incident does not support Tilley's account. Roberts who, according to Johnson's uncontroverted testimony in this area, handbilled regularly in his presence, had not been menaced by Johnson or, at least, did not testify to that effect, and Tilley, at a distance of 20 to 25 feet from Johnson when this incident was to have occurred, might well have been out of hearing range. This is particularly true if, as described, she had been busy handing out union literature at the time. In evaluating the conflicting testimony, I note Johnson's candor in taking the initiative to testify that Roberts had accused him of intimidating employees who might pass receive literature and that he had declined her request to avoid this by going back inside. In such circumstances, however, Johnson's mere observation of employees' handbilling on company premises, without more, would not constitute unlawful surveillance. The Board has held that ''[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to complain that management observes them.''[97] Noting that neither Johnson nor Tilley knew each other on the day in question; that Roberts, apparently, often had joined in handbilling at that location in Johnson's presence without unlawful incident; that Roberts did not corroborate Tilley; and that Johnson was not involved in any other form of unlawful conduct in this proceeding, I find that the weight of the evidence does not support Tilley's account and, therefore, it is concluded that Johnson did not make the unlawful statements attributed to him. In so finding, I note that while Tilley's testimony like that of certain other witnesses, was deserving of greater respect by virtue of her continued employment by the Respondents at the time of the hearing and, accordingly, had testified against her own pecuniary interest,[98] this was but one of several above credibility factors, which, in my view, did not overcome other considerations indicating that the Act had not been violated.

h. *Removal of prounion literature from company bulletin boards*

Live haul driver Dennis Dimmette testified that the Company allowed its employees to post notices on the several bulletin boards in the live haul department and that he had been among those who had exercised that privilege. Dimmette related that on several occasions between March and July, while the representation election petition for the live haul unit was pending, he posted union notices on those bulletin boards. While such notices might have been permitted to stay up all night, they somehow were removed by the time the first-shift workers arrived around 7 or 8 a.m. Although Dimmette never saw anyone take them down, the notices he posted never remained up for more than a day. On the other hand, other posted notices, such as those relating to items for sale or miscellaneous announcements unrelated to the Union were left alone. In view of Dimmette's testimony describing repeated removal of notices posted by him, the burden passed to the Respondents, who controlled the bulletin boards to enter a denial or an explanation, which they did not do.

From Dimmette's uncontroverted testimony, I find that the Respondents violated Section 8(a)(1) of the Act by discriminatorily excluding prounion literature from their live haul department bulletin boards before the election while, at the same time, leaving undisturbed other posted notices not germane to the Union.[99]

i. *Unilateral changes in absenteeism and pension policies—facts*

Dimmette testified, also without contradiction that, on October 1, the Respondents unilaterally changed the existing policy requirement as to when absent live haul employees must call the Company to report their status.[100] On October 1, this policy was changed to require that any employee who

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[97] *Porta Systems Corp.*, 238 NLRB 192 fn. 4 (1978), and cases cited therein. Also see *Southwire Co.*, 277 NLRB 377, 378 (1985).

[98] *Rodeway Inn of Las Vegas*, supra; *Gold Standard Enterprises, supra* .

[99] *Marathon Le Tourneau Co.*, 256 NLRB 350, 357–358 (1981).

[100] Unlike most other above-alleged violations of Sec. 8(a)(1) of the Act, this incident, which occurred on or after October 1, relates to the period after Tyson assumed control of Holly Farms.

was absent for 2 days must call in or be terminated. Before this change, live haul employees had been required to call the Respondents only after they were absent for 3 days.

Dimmette further testified that, during the second week of December, he received a letter from the Respondents, which he did not retain. He related that this letter had announced that the Holly Farms retirement plan would be terminated in September 1991 when it would be paid out. Dimmette does not recall who signed that letter.

In mid-January 1990, however, Dimmette attended a meeting conducted by Personnel Manager Barbara Mathis where the pension plan was discussed. Also present were Ray Lovette, Jerry Tilton of personnel, and all the night-shift live haul supervisors and employees. Mathis gave the employees the status of the retirement plan, explaining how much money was in the plan and announced that in September 1991 the plan would be terminated and the employees paid off. This was followed by a question and answer session. As Dimmette recalled, no questions were asked about the changes in retirement, but some were raised about other matters.

Lankford, on the matter of retirement policies, testified that when he had given his April 12 speech to groups of live haul employees, he answered employee questions. With respect to an employee inquiry as to what would happen to the pension plan in the event of a takeover of the type discussed in that address, Lankford had told the employees there, and at other meetings where that speech was read, that the pension plan was something that the employees owned which nobody could take away from them. If the Company was sold, the employees' vested interest in the plan was theirs and could not be taken away whether the Company was sold to Tyson or Conagra[101]—no matter what happened to Holly Farms.

Lankford also told the employees at those sessions that if Tyson bought Holly Farms, there was a good chance that Tyson would terminate the Holly Farms, pension plan and put in their own plan, different from that of Holly Farms. On the other hand, if Conagra won the bidding process, there was a good chance that that Company would leave the Holly Farms, pension plan in place exactly as it then was.

Since the alleged unilateral changes concerning absenteeism and pensions relate to bargaining and took place after Tyson became the Respondents' principal, these issues will be considered below in the discussion of the bargaining relationship between Tyson and the Union.

3. The alleged 8(a)(3) violations

a. *The discharges*

(1) The discharges of four plant employees—parties' position

The General Counsel and Union contend that in March and April, Holly Farms terminated four of its plant workers, Alvin Bouchelle, Patricia Barker, Raymond K. Huffman Jr., and Joe Richardson, because of their union activities. These parties argue that the Respondents' position that Bouchelle, Barker, and Huffman were discharged because they had violated the Company's rule against soliciting in work areas during working times was pretexual because sales and other solicitations in work areas during worktimes long had been rampant throughout the Respondents' plants. Only Bouchelle, Barker, and Huffman, as union activists, had been singled out for discharge.

The Respondents concede that Richardson was terminated for his union activities, but argue that such action was justified and that Richardson was unprotected by the Act because he then was a supervisor within the statutory definition. The General Counsel and Union deny Richardson's asserted supervisory status.

(2) The discharge of Alvin Bouchelle—facts

Bouchelle[102] testified that on March 31, as he arrived for work, his department head, Plant Engineer Marion McKinley (Al) Bare, summoned him to the office of Robert Pipes, second-shift plant superintendent. Bouchelle met there with Pipes, Bare, and David Fairchild, the plant manager. Bare asked if Bouchelle had been involved in any union activity. Bouchelle told him yes, that he had been soliciting signatures for union cards in the upstairs nonwork area. Bare told Bouchelle that he had an eyewitness who had stated that Bouchelle had passed out union cards downstairs, which Bouchelle denied.[103] Bare continued that Bouchelle had been charged with a serious violation of company policy and that he had no choice but to terminate him. Bouchelle was not told in the course of that interview the names of any employees with whom he was to have interfered. Bouchelle did not reply and was escorted from the plant.

The Company's personnel change of status (discharge) form, dated March 31, signed by Al Bare, as department head, and Dan Spears, as supervisor, set forth the following explanation for the discharge:

> Alvin has been disrupting employees from doing there [sic] job by soliciting union membership while down in the plant on the job.

Another item on this form, whether the signatory supervisors would rehire this employee, was checked ''no'' because of Bouchelle's disregard for company policy. However, the supervisors wrote that they would consider rehiring Bouchelle under certain conditions in the future, ''if we get assurance that he understands and will abide by company policy.''

Bouchelle testified that he had solicited many employees to sign authorization cards during the Union's campaign. Most were approached in the upstairs break and nonwork areas, and while they were entering the plant. He also had solicited four or five employees to sign authorization cards downstairs in the work area, during worktime, but not while they actually were working. Such employees, when solicited downstairs, were in the hallways, in the maintenance shop, or in production areas while the lines were down. Bouchelle

[101] Conagra, Inc., a large food company, had been Tyson's principal rival in its efforts to acquire Holly Farms.

[102] Bouchelle had been employed by Holly Farms as a maintenance employee in the Wilkesboro food service plant since May 19, 1986.

[103] The food service plant was a two-story building with production facilities located on the first floor and, a breakroom, dry storage, offices, and the quality control laboratory on the second floor. The first floor generally was considered a work area where the Respondents contend that solicitation was prohibited.

testified that most of the people he spoke to initially had asked him for the union cards, but not while he was at work.

Bouchelle's maintenance duties required that he move about the plant. While his main job was to maintain the fry lines where chicken was cooked, his work, which included welding and all types of repairs, took him all over.

Bouchelle testified, as did other elmployees, that there long had been solicitation by supervisors and employees in all plant areas. Products such as Girl Scout cookies, Avon products, raffle tickets, and tickets for community events were regularly sold. He related that on several occasions after he had begun work on his second shift, first-shift employees still in the plant asked him to buy raffle tickets.[104] Bouchelle related that, while supervisors were in the area during working time and in the workplace, he had purchased raffle tickets from employee Tony Miller, another named employee and from several other employees at unrecalled dates. So extensive were these sales that Bouchelle had not known there were restrictions on solicitations or on the distribution of literature. No supervisor ever had told him not to buy a raffle ticket in the work area.

Lankford denied having known of any breaches of company policy, including described sales by a supervisor of Christmas ornaments and poker games. He explained that such sales and poker games during worktime were against the rules but that it was not contrary to company policy to sell items in the bathroom. Sales of raffle tickets or other work items would be appropriate as long as such sales did not interfere with work.

Quality control employee Tony Miller, called by the Respondents, testified that, in November 1987, he had sold Bouchelle raffle tickets sponsored by a volunteer fire department of which Miller was a member. This transaction occurred by the sink in the front area of the plant while Miller, a first-shift employee, was leaving work and Bouchelle was arriving for work on the second shift.

Miller related that he has sold raffle tickets only in the breakroom and to employees in hallways coming from or going to the breakroom. He did sell Bouchelle raffle tickets on one or two earlier occasions but does not recall having sold them to him at any place but at the sink. Miller also has sold raffle tickets to employees when they came to work in the second-floor quality control laboratory area, where he kept supplies. Miller's supervisor, David Taylor, also has purchased a raffle ticket from him in that laboratory. Miller never was reprimanded or disciplined for selling raffle tickets in the laboratory.

Bobby Ray Garris, identified by Bouchelle as a supervisor[105] who might have seen him buy raffle tickets in the work area, denied that he had observed any employee selling or buying items in the work area. Garris also did not participate in sports pools.

Bare testified that as plant engineer at the food service plant, Wilkesboro, he was responsible for the plant, mechanically and structurally. Bare was assisted by a maintenance crew.

In March, Bouchelle was a maintenance lineman who took care of fried chicken lines 1, 2, and 3 and, if called, also took care of line 4. Lines 1, 2, and 3 occupied areas of about 100 feet in length and the four lines together occupied slightly less than 25 percent of the overall plant area.

Bare testified that, during a conversation with Plant Manager David Fairchild; Joe Griffin, then vice president of production; and Robert Pipes, second-shift superintendent, one of the foregoing had told Bare that employee Ray Hunt had reported through a supervisory chain of command reaching to Pipes, that on March 29 Bouchelle had aggravated Hunt by trying to get him to sign a union card. Bare asked where this had taken place and was told that it had occurred in the hall in front of the maintenance shop.[106] Bare asked what they were supposed to do about Bouchelle. Griffin replied that Bouchelle should be terminated if he had been doing this and told are to call in Bouchelle to talk to him and to get his side of the story.[107]

That afternoon, Bare called Bouchelle to Pipes' office where he met with Bouchelle and Pipes.

When Bouchelle entered, Bare asked if Bouchelle had been handing out union literature and cards in the plant during work hours; bothering employees while they were working. When Bouchelle asked where, Bare replied around the maintenance shop. Bouchelle answered that he had only given Ricky Prevette, a third-shift maintenance employee, some papers. Bare told Bouchelle that he had been told that Bouchelle had handed out things besides that outside of the maintenance shop. Bouchelle did not answer. Bare told Bouchelle that he was asking him to either quit or be dismissed. Bouchelle told Bare that he did not believe this was occurring ''just for that.'' Bare stated that, as Bouchelle knew, he had been told just the other day that he was not supposed to be doing such things during work hours and in the work areas. A place had been provided for such purpose.[108]

According to Bare, Bouchelle replied that he did not think Bare should fire him for this. Bare answered that if Bouchelle did not like what the Company was going to do, he could take it to the Labor Board; Bare thought that the Company's actions were right. Bare accompanied Bouchelle to the maintenance shop where Bouchelle turned in his tools and gathered his personal belongings. Bare helped carry his

[104] The second shift, to which Bouchelle had been assigned, with some fluctuation, worked from between 3 to 3:30 p.m. until 12 to 12:30 a.m. Sometimes the shift continued until 1 a.m.

[105] Garris, a former fry line supervisor, had been a rank-and-file employee since September, after Bouchelle's discharge.

[106] Bare testified that at a meeting held sometime before March 31, supervisors had been notified that plant personnel were to be advised that they could engage in union activities in the upstairs break area and in the outside areas. Bare did not testify whether this information was subsequently conveyed to the employees.

[107] As related to Bare by either Griffin or Fairchild, Hunt had been on his way from one job to another when Bouchelle stopped him and asked him to sign a union card in an area between the offices and line 4. When Hunt replied that he did not want to sign a union card and that Bouchelle should let him alone, Bouchelle reportedly had told Hunt to take one anyway, to read it over, and to think about it. Since Bare did not conduct any investigation by speaking to Hunt or to any of the supervisors who had passed along his complaint before acting against Bouchelle on this information, he did not know whether Hunt had been on break or in an assigned work area when Bouchelle approached him.

[108] Fairchild testified, contrary to Bouchelle, that he had not been present at Bouchelle's terminal interview because away on vacation. He had learned of and approved the discharge after receiving Bare's report on his return.

stuff. When they got to the guardhouse, Bouchelle told Bare that he was the best boss that he ever had; that this had been the best job he ever had; and asked Bare for a job recommendation, which Bare readily agreed to provide. He had considered Bouchelle to be a good employee.[109]

(3) Prohibition on discussing pay rates with other employees—affecting Bouchelle—facts and conclusions

The General Counsel further contends that the Respondents had violated Section 8(a)(1) of the Act by Fairchild's admonitions to Bouchelle about 1 week before his discharge that it was against company policy for him to discuss his wages with other employees. In this regard, Bare testified that at the end of Bouchelle's terminal March 31 interview, he reminded Bouchelle about the trouble he had had with him a few weeks before. This was in reference to Bouchelle's complaint at the time about his wages. Bouchelle, in this regard, testified that about 1 week before his discharge, he had spoken to Pipes, Fairchild, and Bare in Fairchild's office. Bouchelle told the three supervisors that he was not receiving the top pay in his job. He had discussed his wages with other employees who, as matters developed, were getting top pay although Bouchelle had been with Holly Farms longer than they. Fairchild told Bouchelle that he, in fact, was receiving the maximum pay for his job and that it was against company policy for him to have discussed his wages with other employees. Bouchelle replied that such a restriction was not in the handbook. Fairchild informed Bouchelle that everything was not in the handbook and told him not to be talking about pay with other employees because it would cause dissension. Fairchild repeated that it was against company policy for Bouchelle to discuss wages with other employees.

Plant Manager Fairchild testified that he had directed that the meeting with Bouchelle be held after supervision had reported that Bouchelle was complaining inside the plant that he was not receiving top pay and was earning less money than another maintenance employee with less time on the job. Accordingly, about 2 weeks to a month before Bouchelle's termination, Fairchild met in his office with Bouchelle, Pipes, and Bare. Fairchild testified that he began by asking if Bouchelle was having a problem with his wages. Bouchelle said that he was; that he had been working for Bare for something like 2 years; that he was not on top pay and that there were other people earning more than himself. When asked what gave Bouchelle this idea, he replied that other maintenance employees had told him so. Fairchild replied that these others could have told him anything, they did not have to tell him the truth. Bare asked Bouchelle how long this had been going on and Pipes, in turn, told Fairchild that Bouchelle had been talking to other people about Bare not having put him on top pay for the last month or two.

When Fairchild asked Bouchelle why he had not talked this over with him, if he felt that he had a problem talking with Bare, Bouchelle replied that he did not want Bare to get the idea that he was talking about him behind his back. Bare became upset, retorting that Bouchelle had been talking behind his back to everybody in the house; what was the difference? Fairchild smoothed the situation and asked Bouchelle what proof he had that he was not making top money. Bouchelle did not know what he was earning but stated that he thought he was making $6 or $7.69 an hour and that everyone else was earning more. Fairchild told Bouchelle that he was on top pay, that he was receiving the $7.79 an hour maximum that was being paid at that time in maintenance. When Bouchelle questioned this, Fairchild told him that he could prove it and showed Bouchelle a computer printout substantiating what he had stated. When Bouchelle said that the computer printout was wrong, Fairchild asked if Bouchelle had ever looked at his pay vouchers, his checkstubs. Fairchild reassured Bouchelle that the printout told him what he was earning.

After the meeting was over, Fairchild told Bouchelle that the entire problem could have been avoided if he had first discussed this matter with his supervisor. Fairchild told Bouchelle that he always had someone to go to. If his supervisor told him something with which he neither agreed nor understood, he always could go to Fairchild. If Fairchild could not understand the problem, he could go to Fairchild's boss.

In response to Bouchelle's testimony that Fairchild had told him that it was against company policy for him to have discussed his wages with other employees, Fairchild related that he merely had told Bouchelle on that occasion that it was not a good idea for him to talk to other people about his wages because they could tell him anything. Fairchild denied having directed Bouchelle not to talk to others about his pay or that there was any rule or policy at the food service plant prohibiting employees from talking about pay rates. Employees talked about them all the time. He had suggested to Bouchelle only that others with incomplete information might mislead him and that the problem could have been avoided if he had spoken to a supervisor.

In crediting Bouchelle's testimony that Fairchild had told him that it was against company policy for him to discuss his wages with other employees, I note that Fairchild's testimony that he simply had cautioned Bouchelle not to talk to other employees on this matter so as to avoid being misled was countered by Bare's testimony that, weeks later at Bouchelle's terminal interview, Bare had reminded Bouchelle of ''the trouble'' he had had with him during that earlier conversation on the matter of wages. The incident apparently had registered sufficiently to have been raised by supervision weeks later when Bouchelle was being discharged. Noting, too, that Fairchild, in addition to approving Bouchelle's termination, also was involved, below, in the unlawful discharge of Joseph Richardson, admittedly for union activities, I accept Bouchelle's testimony concerning this incident as the most credible and find that the Respondents violated Section 8(a)(1) of the Act when Fairchild prohibited Bouchelle from discussing his wages with other coworkers because violative of company policy.

[109] Bare testified that he, too, had seen raffle tickets and other community-type organization tickets, such as those sponsored by the Rotary Club, sold in the plant and before 1989, had seen Girl Scout cookies sold in the hallway to individuals who were going to or from the breakroom. In 1988, he had seen employee Tony Miller sell raffle tickets in the first-floor hallway at the foot of steps descending from the second-floor breakroom. Bare had not spoken to Miller at the time about this.

Within the preceding 5 years, Bare had seen employees both selling and buying items in the plant when those employees were supposed to have been working.

As noted by Administrative Law Judge Leiner in his Board-approved decision in *Independent Stations Co.*,[110] the establishment of such a rule, ''without regard to circumstances relating to time, place or opportunity . . . prohibits employees from engaging in 'mutual aid or protection,' the very substance of the activities protected in Section 7 of the Act. . . . [It is] of no legal consequence that the rule did not contain within its terms the admonition that violation would lead to dismissal. The mere existence of the rule prohibiting protected conduct, even if not enforced, constitutes unlawful interference in violation of Section 8(a)(1) of the Act.''

(4) The discharge of Patricia Barker—facts

Patricia Barker[111] testified that, on April 11, about 5 minutes before the end of her shift, David Eller, her supervisor, holding her timecard, told Barker to accompany him upstairs. There, she met in the personnel office with Mary Barnes, second-shift personnel manager; Eller; and Jerry Blevins, second-shift plant superintendent. Barnes stated that she had heard that Barker had been handing out union cards during worktime. When Barker answered that this was a lie, Barnes countered that she had proof that Barker had done this. Barker asked where was the proof, repeating this request several times, and declaring that she had done her job. Barnes replied that no one was saying that Barker had not done her job but that Barker was being discharged for union activities. Barker left, slamming the door.[112]

The Holly Farms personnel change of status (discharge) form, issued April 11 and signed by Barnes, gave as reason for the action taken: ''Violation of known company rule—soliciting.''

On March 7, only about 1 month earlier, Barker had received a 21-cent-per-hour pay raise for having accepted a higher-paid job of filleting chicken thighs at the suggestion of her supervisor, Eller. Previously, Barker had been packing thighs. As noted, the Respondents do not contend that Barker was terminated because of her job performance.

Barker testified that, although involved with the union campaign at the plant, she never had distributed union authorization cards during worktime. However, about 1 week before her termination, Barker had had a number of conversations in the plant with an employee named Rachel, later identified as Virginia Rachel Wyatt. One such conversation had taken place in the hallway when Rachel, according to Barker, asked if Barker had been to a union meeting. When Barker said yes, Rachel wanted to know about the Union. Barker told her as much as she knew. Rachel again also asked Barker for information about the Union while Barker was working. Accordingly, at Rachel's request and during a break taken near Barker's locker, Barker wrote the telephone number of the union representative. After the break, she slipped the telephone number into Rachel's pocket. No one else was in the area at the time.

Barker related that when, in December 1988, she had returned to Holly Farms' employ, her supervisor, Eller, was selling Christmas tree ornaments made by his wife on the line while she was at work helping to pack chicken breasts.

She testified that during her first period of employment with Holly Farms, her then supervisor, Shelton Goddard, had sold knives to employees while they worked on the line and, during her second period, it was very common to see the distribution of Avon and Tupperware Books and solicitations for football pools during worktime. The football pool was a weekly event. In addition, an employee in Barker's department, known as Mama Sadie, sold homemade foodstuffs during worktime and employees would send money to her by a floorboy or else run over themselves to personally buy items when the should have been working. However, about a week before her termination, when Barker was going to make a purchase from Mama Sadie, she was told that Mama Sadie no longer was allowed to sell her goods while the employees were at work and now kept her supplies in the office or upstairs. Barker has seen Eller buy items from Mama Sadie, whom Barker described as a good cook.

Barker's testimony concerning the frequency of unauthorized activities by employees in the workplace during worktime which were unrelated to the Union, was corroborated by Carol Eller, a Holly Farms' production employee for more than 17 years.[113] Eller testified that since she had been working at the Holly Farms main processing plant, employees have sold many items. While working on the line, employees would solicit purchases by other employees of Tupperware and of items shown in ''Home Interiors'' or ''Princess House'' catalogues. Also, the children of many employees attended various schools that sponsored sales. Eller personally has bought many items or sold Tupperware during worktime and in work areas on her 8 a.m. to 4:30 p.m. shift. During her worktime and in her work area, Eller, during the week before her testimony, purchased Girl Scout cookies. Although she was working at the time, Eller was not disciplined. She believed that her supervisor, Ray Owens, also, may have bought some cookies because the vendor showed them to him, as well.

Eller identified a series of six photographs taken inside the main plant. Five of these photographs, which were taken in the ladies' restroon, showed sale items on display. Only one photograph was taken on the production line. This showed an employee, Nancy Ann Anderson, reading a ''Home Interior'' catalogue on the production line while another employee standing next to her apparently was working. Anderson was shown in the photoqraph as reading the magazine with her back turned to the production line. Eller explained that this production line picture was taken after Eller, having noticed that Anderson was standing on the line reading the magazine, told the lady working near her that it was too bad

[110] 284 NLRB 394, 396–397 (1987). Also see *Jeannette Corp.*, 217 NLRB 653, 653–654, 656 (1975), enfd. 532 F.2d 916 (3d Cir. 1976).

[111] Barker, first employed by Holly Farms from August 1982 until August 1988, resigned to take other employment. She returned to Holly Farms in December 1988 where she remained until terminated. When employed for the second time, Barker worked in the fillet department of the main processing plant, Wilkesboro, during the second shift.

[112] Barker testified that the only thing that Eller had said to her while en route to the personnel office was that this was not of his doing. At that time, she did not know what he was talking about.

[113] Carol Eller began her employment at Holly Farms by hanging chickens. When that job was eliminated, she moved to line 3 where she cut drumsticks for 15 years. When chicken cutting became computerized, she returned to hanging chickens in the packing department under Supervisor Ray Owens.

they did not have a camera to prove that solicitation was going on at Holly Farms. Her neighbor volunteered that she did have a camera in her car. At Eller's suggestion, the other employee left the production plant, went to her car, and returned about 3 minutes later with a camera which she handed Eller. Eller told her neighbor that she did not know how to use a 35 millimeter camera. Her neighbor instructed her to push the button and returned to work. Eller turned around and took the picture of Anderson who had continued to read the magazine for about 5 or 6 minutes. Eller underscored that the lady who had worked next to her had felt free to leave the production line, to go to her car, and to return with the camera although not on break. While this other employee was getting her camera, Eller did both of their jobs.

Anderson, the employee portrayed in the photograph and called as a Respondents' witness, explained that she had examined the catalogue during a slow time in her work routine. Anderson's job at the time had been to keep the chicken bins, which were fed from a drop chute, from holding too many birds so as to prevent the chute from stopping up and tearing the product. Before starting work that day, Anderson had agreed to the request of Victoria Johnson, the employee at the next work station, to look at Johnson's ''Home Interiors'' catalogue. About an hour after the shift began, Anderson, noting that the bins were in good shape, began to look at the catalogue which Johnson had placed near her. As it was Anderson's job to make sure that Johnson, who was hanging chickens, had enough birds to hang, Anderson conceded that she should have been turned around facing the line in the same direction as Johnson when the picture was taken. Anderson agreed that company policy forbade selling, buying, or looking at books while employees are supposed to be working and she is not aware of any other occasions, except for that shown in the picture, when employees had engaged in such conduct. Anderson testified, however, that her own supervisor, who had not been there at the time, could not have observed her.

When, 3 or 4 days later, Carol Eller had brought in the photograph and showed it to her, Anderson asked why Eller had taken the picture. Eller replied that she had a scrapbook of all of her friends and wanted to take a picture of her and put it in the scrapbook.[114]

Anderson has continued in the Respondents' employ and there is no evidence that she was disciplined for her conduct shown in the photograph.

The record reveals that Barker's termination was precipitated by a complaint from employee Virginia Rachel Wyatt. Wyatt, assigned to pack chicken parts, testified that Barker had worked in the fillet department about 5 feet in front of her. Wyatt testified that on three occasions Barker had stopped working and had come down the line to interrupt her on the job to tell Wyatt that she should sign a union card.

Wyatt recalled that Barker first came to her work station at an unrecalled time after the start of the Union's campaign and asked Wyatt, then working, if she had signed up for the Union. Wyatt noted that Barker, too, should have been working at the time. Barker returned to Wyatt's station later in the same shift and again asked if Wyatt would be interested in signing a union card. Wyatt did not answer.

Wyatt related that, on the next night, Barker stuck a paper with a name and telephone number on it in Wyatt's pocket, telling Wyatt that it was the name of the Union and the telephone number where Wyatt could get in touch with them. This third incident occurred while Wyatt again was working and at a time when, as Wyatt testified, Barker, too, should have been working.

Thereafter, on the Monday following a Saturday union meeting, Barker told Wyatt on the stairs that she had been missed at the meeting.

Wyatt, thereafter, described the incidents concerning Barker to Personnel Manager Barbara Mathis, who asked Wyatt to give a written statement that Barker had approached her several times concerning the Union. Wyatt denied having asked Barker for any union materials or for the Union's telephone number, which number she gave to Mathis when making the statement.

Wyatt averred that, during the preceding 5 years, no one had approached her on the line to request that she do anything not related to work. She has not seen employees attempting to sell or pass any type of material to other employees on the line and no one had approached her for such purposes. Employees at work were allowed to talk to employees next to them if they could hear and understand what the other employee was saying. Wyatt, personally, had never spoken to those working next to her but had overheard conversations between other employees.

In February 1990, Wyatt, who had been working in the main plant fillet department for about 2 years, packing thighs, was moved to the packing department where she packed chicken parts. Since she no longer was required to trim out shattered bones left in the parts that she packs, her new job, which is paid at the same rate, is easier on her than were her duties in the fillet department.[115]

Mary Barnes, second-shift personnel manager, testified that, on April 11, Personnel Manager Barbara Mathis, to whom Barnes reported, had remained on duty for part of the second shift. At that time, Mathis told Barnes that Wyatt had signed a statement, in Mathis' possession, stating that Patricia Barker had asked Wyatt to join the Union. Mathis told Barnes that, if necessary, she would stay and take care of this matter, but preferred that it be taken care of by the second shift. Barnes read the statement referred to by Mathis but did not personally investigate Wyatt's charges against Barker.

Barnes asked Barker's supervisor, David Eller, to bring Barker to the personnel office. Also present at the time were Jerry Blevins, the second-shift plant superintendent and Eller, neither of whom said anything during the interview.

Barnes told Barker that it had been brought to her attention that Barker had been soliciting for the Union during worktime, at her work area, and that Barker was being terminated for having interfered with the work of another employee by soliciting for the Union. Barker replied that she did not understand what Barnes was saying. Barnes told Barker that she had a statement, which Barker asked to see.

[114] The supervisors to whom Anderson and Eller reported testified that they were in their respective areas at the time and did not observe the above events. Both agreed that picture-taking and examining literature at the workplace during worktime were against company policy.

[115] I find no evidence that Wyatt's new, less physically demanding job was a reward for having cooperated with the Company.

Barnes, who did not identify the complainant, told Barker that she did not have the statement at her disposal at the tine but that if she needed to see it, she could go to Barbara Mathis. Barker left the office without further response.

Barnes testified that although Holly Farms, depending on the situation, had a system of progressive discipline whereby discharges were preceded by a series of oral, then written, warnings, no consideration was given to discipline less severe than discharge for Barker even though she was a well-regarded employee who had received a higher paying job and accompanying pay raise only about a month before.[116]

(5) The discharge of Raymond K. Huffman Jr.—facts

Raymond Huffman[117] testified that on April 7, Luke Roten, his immediate supervisor, told him that Barbara Mathis, the personnel manager, wanted to see him. Accordingly, he met with Mathis in her office. Also present were Main Plant Manager Harold Eller; Gary Hamby, processing superintendent, first shift; and Huffman's supervisor, Roten. When Huffman entered the office, Mathis asked if he knew the Holly Farms' company policy. When Huffman said yes, Mathis told him that the Company had a statement saying that Huffman had been harassing somebody on the line about union cards; that Huffman had been going person to person, line to line, about the Union; and that he now was being terminated. Huffman told Mathis that he was not for the Union right then and asked the Company to reconsider and give him his job because he needed it. Mathis shook her head and said that they could not do that. She told Huffman to leave and that a guard would escort him out the door, but that he could come back for his check on the following Friday at which time he could bring in his uniforms. Other than that, the Company would have him arrested if he returned to its property.

Huffman testified that, before the start of the union campaign, the Company had not restricted him from engaging in discussions in the workplace and had not told him that he could not talk during worktime. Huffman had supported the union campaign, speaking to employees about the Union during breaks. However, he denied having interfered with employees while they were working. On one occasion, when employee Agnes Mash had spoken critically of the Union in the hall to other employees, Huffman told her that she should not say anything about the Union without knowing something about it. He suggested that Mash attend one of the union meetings and listen to Union Organizer R. W. Brown. Huffman recalled having spoken to Mash about the Union on one other occasion, but not in her work area which was about 40 yards from his work station. Huffman denied ever having approached anyone working on the line about the Union while they were working. He spoke to employees about the Union when passing them on the line, but only if they stopped him to inquire.

Huffman averred that earlier on April 7, the day he was terminated, employee Virginia Brown, who worked in the area, had approached and asked Huffman to read an article she was holding. Huffman told Brown that he could not read. Brown, instead of returning to work, then began to read the article, which was antiunion, to Eviscerating Line Supervisor Ted Roten for about 2 to 3 minutes. Roten did not say anything to Brown while she read and, to Huffman's knowledge, Brown was not disciplined or warned because of having then read that article.

Like Branscome and Barker, Huffman had observed other distractions in the work area. In the spring and summer of 1989, Supervisor Jean Waters sold perfume and what appeared to be Avon products and she and Norman Hale also sold football cards. In the knife room, where knives and scissors were ground and repaired, five employees named by Huffman played poker during worktime and had just finished a short round before his discharge. There also was a football pool conducted in work areas.

Huffman testified that on a number of occasions his own supervisor, Luke Roten, would ask him to get employees who had overstayed their time from the breakroom. Most recently, this had occurred about a month before Huffman's termination when Roten asked Huffman to get employees Tina Eller and Lynn Billings, who had overstayed their break by 5 to 10 minutes.[118]

The record reveals that Huffman was terminated pursuant to a complaint initiated by Agnes Mash.[119] Mash testified that in the spring, Huffman walked from line 2, where he was assigned, to behind Mash while she was at work and asked if Mash had signed a union card. Mash said no. When Huffman asked why, Mash replied because you do not fool around with things you do not know about. According to Mash, Huffman told her that he went to all union meeting and got free drinks. He then moved down the line.

When Mash's break began, she approached Jean Waters[120] and told her that little Raymond is union crazy; that Huffman had walked over to her and had bothered her while she was working.

[116] Sadie Mae (Mama Sadie) Vannoy, a fillet department employee, testified that for the past 20 years she had been selling various food items, including homemade sandwiches, cake, candy, and pies, in a hallway separated from the fillet room by a wall. During the years that she has been doing this, she always had sold these items in the same place and only during her breaktime. If foodstuffs were left over, at the end of her work shift, she would set another display in the hallway where employees could make purchases as they left. She did this while waiting after the end of her shift for her son to finish work and pick her up. No company representative ever had spoken to Vannoy about items she sold in the hallway. She did not know about the purchase and sale of other items or of football pools, and was aware only of her own business.

[117] Huffman was employed by Holly Farms for 10-1/2 years as a floorboy in the eviscerating department, main processing plant. His duties involved keeping the lines supplied with chicken parts and paper towels and helping to roll out barrels of discarded waste. Huffman was expected to leave his area to go to other departments for supplies and to help keep the floors clean.

[118] Roten confirmed Huffman's testimony that he would send Huffman to get employees from the breakroom who had stayed past the end of their break periods. When Huffman brought them back to work, Roten simply would chide these employees, but there was no evidence that any employee was ever disciplined for such conduct.

[119] Mash, assigned to line l, was pulling craws and using clippers to cut the necks of the chickens as they passed her station.

[120] Waters was a floating, or extra, supervisor who worked on either lines 1, 2, or 3 as needed. Waters, too, had been selling Avon products at the plant for the past 6 or 7 years, but denied having done so during working time or in work areas. Her practice was to leave a catalogue and order forms in the breakroom where employee-customers could fill in and leave the forms.

Later that day, Mash's immediate supervisor, Ted Roten, told her that she was wanted in the office. He accompanied Mash to the office of Personnel Manager Barbara Mathis who asked if Huffman had been bothering her; what had he been doing. Mash told Mathis that Huffman had been on her line while she was working and asked if she had signed a union card. While Mash waited, Mathis prepared a statement which Mash signed and returned work.

Huffman was terminated the day Mash had mentioned him to Waters.

Mash explained that her objection to Huffman's brief visit had been that she was required to stop working and to turn around when Huffman asked if she had signed a union card. Although Huffman had been with Mash for only a few seconds, Mash had been holding her clippers and the delay in her concentration, at the existing line rate, could have caused Mash not to process certain chickens as they passed her at a rate of 70 per minute.

Waters confirmed that at the start of her break, Mash had told her that ''Little Raymond'' had gone union crazy; that Huffman had come to the line and asked if she had signed a union card; that she had told him no, she did not want to; and that Huffman had really bothered her. Mash told Waters that she did not want Huffman bothering her when she was trying to do her job. Holly Farms had been good to Mash and she did not want anything to do with the Union and did not feel that Huffman should be talking to her. Waters then reported this conversation to Plant Superintendent Danny Eller, who, in turn, conveyed the incident to Mathis.

Mathis recalled that when Mash arrived at her office, she appeared very upset—pale with trembling hands. Mathis asked what in the world was wrong. Mash replied that she was tired of Raymond Huffman aggravating her and talking to her about the Union. She related that when Huffman walked over behind her while she was using clippers to pull craws, it had made her mad and upset. Mash complied with Mathis' request that she give a statement concerning this incident.

Mathis next consulted with Plant Manager Harold Eller. They reached a decision to terminate Huffman's employment. Accordingly, Mathis called Huffman's immediate supervisor, Luke Roten, and asked him to bring Huffman to her office.

When Huffman, accompanied by Luke Roten, arrived at Mathis' office, she asked if Huffman knew the company policy about harassing other employees. Huffman said yes. Mathis went on that she had understood that Huffman had been harassing other employees on other lines and that the Company was going to have to terminate him. Huffman protested that he had not done anything. Mathis told him that she had a signed statement accusing him of harassing Agnes Mash on the line while she was working. Huffman reiterated that he had not done anything. Mathis related that Mash told her that Huffman had come to her job station, had harassed her, and interfered with her work, and that Mash had been afraid that she was going to get cut because he surprised her from the rear. Mathis did not ask Huffman for his version of events, claiming that Huffman had just kept repeating that he had not done anything. Mathis also had not consulted with Huffman's immediate supervisor, Luke Roten, about terminating Huffman, explaining that the incident had not occurred on Luke Roten's line. Although Mathis stated that she would have spoken to Luke Roten had the incident occurred in his jurisdiction, she similarly did not consult with Supervisor Ted Roten on whose line it did take place. Luke Roten testified that, prior to Huffman's discharge, only he had terminated employees assigned to him, which he did when they had missed too much work or had not produced.

Luke Roten related that in 1990, he had given a written reprimand to a male employee who had harassed a female employee while both, supposedly, were at work on Roten's production line. The male employee had tried to speak to the female employee who, wearing earplugs, had ignored him. The male employee, stationed next to the female worker, took out her earplugs and set them in the drain. The reprimand was given for pulling out her earplugs. To Roten's knowledge, before Huffman was discharged, there had been no discussion about issuing Huffman a written warning as an alternative.

The Respondents' witnesses contradicted various aspects of Huffman's testimony. Employee Virginia Brown denied having read any literature to Huffman or even to herself while inside the plant. Brown's supervisor, Ted Roten, did not recall that Brown ever had read a newspaper article to Huffman or anyone else in the work area. Ted Roten related that because Brown processed a great deal of product that passed her on the line at the described rate of 70 birds per minute, he would have missed her quickly had she left her station to play poker in the knife area.

Eviscerating department employee Lola Mae Johnson, assigned to line 4, was absent from work on sick leave from March 28 until May 17, but had seen employees buy and sell merchandise only in the cafeteria, breakroom, and nonwork areas, but not in work areas. Johnson did not play cards but, in any event, would not have had time to do so at the plant. Roscoe Baumgarner, a first-shift knife sharpener in the eviscerating department, and offal department employee Freddie Dean Wilmoth who, before 1989, had worked in the knife room, both testified that they had not seen poker or other card games in the knife room or elsewhere in the plant and that all employee purchases and sales of merchandise had taken place outside work areas. The sanctity of work areas from commercialism and gambling was further attested by eviscerating department employee Ronie W. Huffman, unrelated to Raymond Huffman, and main processing plant employee Norman Howell.

(6) The discharges of Bouchelle, Barker, and Huffman—discussion and conclusions

Under *Wright Line*,[121] the Board requires that the General Counsel make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision to act against its employees. If this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[122]

Here, the General Counsel established that Holly Farms, at the time, was extensively utilizing conduct violative of the Act at the Wilkesboro complex in order to discourage union-

[121] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[122] *Hudson Neckwear*, 302 NLRB 93 (1991).

ization.[123] It has been found above that in the period when Bouchlelle, Barker, and Huffnan were terminated, Holly Farms' officials had engaged in a countercampaign involving unlawful conduct, which included, but was not limited to, causing the arrests of three driver employees who handbilled for the Union during nonworktime and in nonworking areas; threatening the arrests and discharges of others; issuing warnings to employees; soliciting grievances from employees and promising to remedy them; threatening closure and contracting of trucking operations and attendant job loss; threatening unspecified retaliation if employees supported the Union; threatening discharge; and coercively interrogating employees concerning their union sympathies. Certain unlawful acts were persistently repeated and publicized so as to affect additional employees.

The General Counsel established that, in this coercive climate, the responsible company officials, before discharging Bouchelle, Barker, or Huffman, knew of their union activities and that such activities had been the immediate proximate cause of the disciplinary actions against them. The question in each instance is whether the discharges, nonetheless, were justified because these employees had violated a valid, consistently enforced no-solicitation rule, as the Respondents assert.

The respective discharges of Bouchelle, Barker, and Huffman were respectively prompted by complaints to management from individual employees when the Respondents' officials knew were opposed to the Union. The officials who discharged Bouchelle and Barker did not personally investigate or interview the complaining employees before taking action and in none of the three cases did the discharging official attempt to obtain the accused employee's side of the story. Instead, each of the three dischargees were terminated about as quickly as the complaints became known, in departure from existing company policy. In this regard, Second-Shift Personnel Manager Mary Barnes testified that, although Holly Farms had an available policy of progressive discipline whereunder employees usually were not discharged for their first offenses, but were penalized for later infractions by a series of increasingly severe disciplinary actions which, for subsequent infractions, ultimately could lead to termination, no consideration had been given to any lesser penalty for Barker than termination. Similarly, inspite of Barnes' reference to the policy of progressive discipline, lesser penalties than discharge similarly were not considered for Bouchelle and Huffman. This was true, although all three employees had performed their work satisfactorily and were considered desirable employees.

In the rush to terminate Huffman, Personnel Manager Mathis did not take time to consult with Huffman's immediate supervisor, Luke Roten. She explained this departure by stating she would have done so had the asserted offense occurred in Luke Roten's production line rather than on the line overseen by Supervisor Ted Roten. However, as noted, she did not speak in advance to Ted Roten, either. Plant Engineer Bare, who terminated Bouchelle, did not know at the time whether Hunt, the employee whom Bouchelle, assertedly, had disturbed, was on break or even in an assigned work area when Bouchelle had approached him.

[123] *Custom Bank Glass Co.*, 304 NLRB 373 (1991).

Considerable testimony was adduced whether Holly Farms had strictly enforced rules prohibiting solicitation and distribution in the work areas during worktime. The General Counsel's witnesses, on this point, described a workplace suggestive of a bazaar, while the Respondents' witnesses who, in practical terms because still employed might have found it difficult to do otherwise, spoke of pristine work areas unsullied by commercialism and gambling—football pools and card games—except in fringe nonwork areas at breaks and during other nonwork times.

I accept the logic of the Respondents' evidence that it had tried to exclude buying and selling and other distractions from the work areas during worktime. It would be difficult for the Respondents to safely and effectively operate their production lines in circumstances where employees at work were readily subjected to interruptions. This is particularly true with respect to the Respondents' operations where employees used knives, cutting machines, clippers, and other sharp implements in their work and where the conveyor systems, within comparatively short time periods, quickly carried large numbers of chickens by the work stations for processing. Absent discriminatory enforcement, a company rule against solicitation and distributions in work areas during worktime is lawful and, with respect to the Respondents' fresh chicken processing and food service operations, may be quite necessary.

However, the record shows that Holly Farms' no-solicitation/no-distribution rule was discriminatorily enforced with particular severity against the three prounion dischargees. The record indicated that termination was not the automatic or necessary discipline regularly applied to employees who interrupted their own work or that of others on the production lines. Although Nancy Ann Anderson's supervisor might not have been present to see her reading a catalogue with her back to the production line, as shown in the above-described photograph, by the time of the hearing, the Respondents, when they called Anderson to the stand as their witness, were well aware of this incident. Yet, the record contains no indication that Anderson was disciplined in any way. Both Plant Engineer Bare and Supervisor Luke Roten testified that, in the past, they had witnessed, without incident, sales and purchases in the plant transacted by employees who should have been working, and Huffman's immediate supervisor, Luke Roten, had merely issued a written reprimand in response to the 1990 complaint of a female employee on his line that a male employee, working nearby, had pulled the plugs from her ears after he had unsuccessfully tried to talk to her while she was working. Although production also was adversely affected when employees overstayed their breaks, making it occasionally necessary for Luke Roten to send Huffman to bring such employees back to the line, no employee ever was disciplined for that infraction.

Anderson's tolerated and photographed reading on worktime while turned away from her work station; the overstayed breaks; the incident concerning the employee who received a written warning for pulling the plugs from the ears of his unwilling fellow worker; and the sales transactions witnessed by Hare and Luke Roten involving employees who should have been working; do not appear to be significantly lesser interruptions affecting production than those charged to Bouchelle, Barker, and Huffman.

Accordingly, a combination of factors, including that the Respondent's officials admittedly knew of the union activities of Bouchelle, Barker, and Huffman when discharging them; that the Respondents' many violations of the Act established their strong union animus at the time; that, absent union involvement, other employees had been treated more leniently for otherwise comparable offenses; that, with respect to Bouchelle and Barker, the Respondents' terminating officials did not investigate beyond the relayed complaints of the employees known to be antiunion with a result that potentially important facts were unknown; that, in the apparent rush to discharge, the Respondents did not seek explanations from the accused employees; and that the Respondents departed from their own policies of progressive discipline and of consulting with the affected employees' immediate supervisors, indicates that the three discharges were discriminatory in nature. The abrupt treatment afforded Bouchelle, Barker, and Huffman seems particularly harsh since all three, as noted, were considered by the Respondents to have been good employees whose retention might have been beneficial to the Respondents. In this connection, Barker, only shortly before her termination, had been given a more highly paid job, and it was noted on Bouchelle's discharge form that the supervisors involved would, under certain circumstances, be willing to rehire him. I find that these considerations sufficiently support the General Counsel's argument that the union activities of Bouchelle, Barker, and Huffman were principal motivating factors in the decision to terminate them.

This having been shown, I further find that the Respondents have failed to meet their burden of demonstrating that these employees would have been discharged absent their union activities.

Accordingly, I find from a preponderance of the credible evidence that Alvin Bouchelle, Patricia Barker, and Raymond K. Huffman Jr. were discriminatorily terminated in violation of Section 8(a)(3) and (1) of the Act.[124]

(7) The discharge of Joseph Richardson—facts and conclusions

As the parties agree that Joseph Richardson[125] was terminated for his union activities, the lawfulness of his discharge is dependent on whether, as group leader on a receiving dock, he was an employee within the meaning of Section 2(3) of the Act and protected under the Act, or whether, as contended by the Respondents, he was a statutory supervisor who had engaged in activities that rendered him vulnerable.

Synthesizing the testimony of Richardson and that of Food Service Plant Manager David Fairchild,[126] on March 28, Richardson, was called to Fairchild's office where he met with Fairchild and the then assistant plant manager, Barry Hatfield. Fairchild asked Richardson what his job was at Holly Farms. When Richardson replied that he was a group leader, Fairchild asked if Richardson understood that being a group leader meant that he was considered a part of the management team. Richardson replied yes, but he did not get into the business much.[127] Fairchild related that he told Richardson that he had a report that Richardson had solicited other people and that he no longer had a job with the Company. Richardson, in turn, testified that he denied to Fairchild that he had participated in organized labor, although admitting in testimony that he had solicited employees on the Union's behalf. Fairchild, however, would not discuss the matter and gave Richardson two choices—either quit or be discharged. Nothing further was said and Richardson left the office and his job. While Richardson's change of status form indicated that he had resigned after reprimand, Richardson testified that he had had no alternative but to leave.[128]

Of about 325 first-shift employees, 15 were group leaders variously assigned in the plant. Visually, each supervisor had three group leaders reporting to him.

At the receiving dock, food services would receive raw products, such as whole birds and various chicken parts and, occasionally, chemicals for cleaning purposes. The receiving dock also had a trash compactor where waste, offal, and other condemned products were eliminated.

Richardson, as group leader on the receiving dock, reported to Supervisor Tony Davis who, in addition to the receiving dock, oversaw employees in the beehive room[129] and the metromatic room.[130] It was Richardson's job to work alongside a receiving dock crew that varied in size according to the number of trucks to be unloaded, but which averaged four to six employees. Richardson's crew regularly included a forklift operator, a trash compactor operator, and four employees who did check-weighing. Richardson, under Davis, was generally responsible for unloading, receiving, check-weighing, removing trash and condemned materials, and for the cleanliness of his area.

Arriving for work about 15 minutes before his crew, Richardson stopped by the transportation department to learn what trucks were in and then proceeded to the plant. He then would call the transportation department for a truck to be placed in one of the dock areas where the crew would unload it. When the truck was unloaded, it would be check-weighed. This was a spot checking procedure to determine if the proper weights were being received. The chicken parts were received in corrugated boxes of 70 to 1200 pounds, with ice on the top of the box and the contents on the bottom. The crew would record the weights on the labels of the received boxes by emptying the boxes to be tested; by weighing the emptied boxes to obtain tare, and by refilling the boxes with ice and product. After the crew's checking had verified the shipment, Holly Farms paid for the actual weights received.

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[124] *Vasador Co.*, 303 NLRB 1039 (1991).

[125] Richardson, with Holly Farms for about 12 years, during his last 3 years, had been group leader on the receiving dock at the food services (Convenience Foods) plant in the Wilkesboro complex.

[126] Fairchild has continued in the same capacity since the Tyson takeover.

[127] Richardson testified that, during this interview, he did not agree that he was part of management.

[128] Although Fairchild had spoken to Richardson on numerous occasions about his job performance and had explained Richardson's job duties as a group leader to him, Fairchild did not recall any specific time prior to the March 28 terminal interview when he had told Richardson that he was a member of management.

[129] The machines in the beehive room separated meat from rib cage bones.

[130] Metromatic machines sized out chickens. Richardson also was responsible for ensuring the cleanliness of the areas outside of the plant and it was necessary to wash down around the trash compactor and to remove droppings from trucks. The receiving department also cleaned the cooler once a week. Richardson joined his crew in performing all of the above tasks.

The check-weighed product then was moved to the large cooler which also contained a large ice machine which made ice for use in the plant.

The trash compactor operator put accumulated trash into the compactor. The crew also took away offal from the communited meat department, where meat was mechanically removed from the bone, and from other places in the plant where product was condemned because fallen on the floor. The forklift was used to dump such products onto offal trucks to be driven to rendering.

Richardson, unlike the salaried supervisors, was hourly paid, earning $1 per hour more than his crews' base rate and 50 cents per hour more than the next highest-paid member of his crew. Also unlike supervisors, Richardson received time and one-half for overtime work. While supervisors wore tan pants and white shirts, he wore the same uniform as his crew—gray trousers and a blue shirt.

Richardson did not substitute for Davis or any absent supervisor. A supervisor from another department would act for Davis in such circumstances. Richardson has filled in for absent group leaders, and other group leaders have replaced him in his absence, as has Davis. Unlike supervisors, Richardson was paid for unused vacation time lost during a given year, but he could not carry unused vacation time past the year in which it was earned. Supervisors received paid sick days; group leaders did not.

While Richardson usually had the same employees assigned to him, particularly on the forklift, trash compactor and for check- weighing, he might not have the same number of employees each day—depending on the number of incoming trucks. If he felt that extra help was needed, he would ask Davis for additional employees or, in Davis' absence, another supervisor. These supervisors, if able, would assign the extra personnel. If additional help was not available, Richardson and his crew would have to get along on their own. When the additional employees no longer were needed, Richardson, advising Davis, would send them back to their regular assignments.

Richardson had no authority to hire, fire, discharge, discipline, or transfer employees to other plant areas, give employees time off or permission to come in late.

Richardson did the paperwork connected with incoming shipments; told any extra helpers where to work; assigned unloading slots at the dock to incoming trucks; instructed those working on the dock as to where to put unloaded products; and, generally, under Davis, was responsible for the proper performance of work in his area. Nonetheless, the record shows that the work performed by his crewmembers was basically repetitive and that the people who worked with Richardson knew to perform their jobs without specific direction from him. Even employees temporarily assigned from other plant areas to help on the dock, as required, often had worked there before and basically knew what to do.

While Fairchild testified that Richardson was consulted by supervision about the work performance of his crewmembers and could effectively recommend pay raises, Richardson denied that he had such authority although he occasionally was asked by Davis how well certain employees were performing. Since there were layers of supervision between Fairchild and Richardson and as Davis, the immediate supervisor, did not testify, I find that Richardson knew his own practical authority better than did Fairchild who had less opportunity to observe and, therefore, I credit Richardson on this point.

As the evidence establishes that Richardson's instructions to employees were routine and did not require the use of independent judgment; as his duties and responsibilities were limited by the nature of the work involved; as there was no showing that Richardson possessed or exercised any of the indicia of authority defining supervisory status, as set forth in Section 2(11) of the Act, and, noting, too, the similarities between Richardson's duties and status and those of dock leadman Freddie Lee Martin in *Central Freight Lines*,[131] where supervisory status was not found, I conclude that Richardson, when terminated, was not a supervisor within the meaning of Section 2(11) of the Act but was an employee, as defined in Section 2(3) of the Act, and, therefore, entitled to the Act's protection.

Accordingly, having found, above, from the undisputed evidence that Richardson was discharged because of his union activities, and also having found, contrary to the Respondents, that he was an employee within the meaning of the Act, I conclude that the Respondents violated Section 8(a)(3) and (1) of the Act by terminating him.

b. *The July 2 pay increase*

(1) Facts

By memorandum to its hourly employees, dated June 16, over the signatures of Dr. Ken May, chairman and chief executive officer, and Blake Lovette, president and chief operating officer, Holly Farms announced that, effective July 2, that Company's hourly employees who worked in nonbargaining units would receive a 25-cent-an-hour wage increase, and that the Company would implement a wage adjustment of 4 percent for its employees covered by production pay systems. The memorandum noted that this wage increase would not have been implemented until January 1, 1990, except that the Company's markets were better than anticipated and companywide efficiency had increased, thereby enabling implementation of the wage increase 6 months earlier than otherwise. The memorandum ended on a congratulatory note to the employees.

The General Counsel and the Union contend that the granting of this raise represented a departure from company policy which did not provide for pay increases at that time, and was a retreat from its December 16, 1988 written announcement of a one-time 3-percent bonus for 1989 based on the employees' projected 1988 earnings. This bonus was to be distributed on December 22, in addition to the employees' regular Christmas bonus. The December memorandum specified that the employees would be receiving the 3-percent bonus as an expression of company appreciation for work well done and instead of any wage increase during the coming year. This was because the Company had found, in comparing itself to its competition, that its pay rates, in most instances, were higher than the rest of the poultry industry. Accordingly, to keep Holly Farms competitive with other poul-

[131] 250 NLRB 435, 446–447, 449–450 (1980), enfd. 653 F.2d 1023 (5th Cir. 1981). Also see *W. C. McQuaide, Inc*., 220 NLRB 593, 611 (1975), enfd. in relevant part 552 F.2d 519 (3d Cir. 1977); supplemented at 237 NLRB 177 (1978), and 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980).

try companies, the Company announced that it was making that special advance payment for the employees' 1989 efforts and that it would not again raise wage rates for 1989.

Holly Farms President Blake Lovette principally explained the general wage increase given to Holly Farms, employees, effective July 2, shortly before the takeover by Tyson. He related that after the fiscal year that ended in May 1988, Holly Farms had implemented companywide efficiency plans closing certain processing plants and consolidating driving operations with a result that employment had been reduced by more than 1000 jobs. In December 1988, while the Company was implementing a plan that was likely to take at least 2 years to fully put in place, Lovette did not want to follow the Company's normal practice of announcing a wage increase in December 1988, to become effective in January 1989, because of market uncertainties. Accordingly, instead of a pay increase, he gave the employees the one-time bonus-type check amounting to 3 percent of their 1988 wages as their pay increase for 1989. This enabled the Company to give the employees a wage increase without raising the pay base and the job benefits predicated on that pay base, and to avoid getting further out of line with its competition.

Lovette explained that, although he had announced that no raises would be given during calendar year 1989, as matters developed, the Company did extremely well during the first half of 1989. Most plans that had been effectuated during the preceding 9 months had begun to work. The reduction of about 1000 jobs had had an immediately beneficial financial effect but, most importantly and unexpectedly, in the spring of 1989, chicken market prices took a sudden 20-percent-per-pound increase so that the fourth fiscal quarter earnings, covering March, April, and May, constituted a record quarter in company earnings.

Accordingly, on the recommendation of senior management, Holly Farms gave a 25-cent-an-hour pay increase to its unrepresented employees, effective June 2 and, around June 24, gave a 4-percent pay increase to all production systems employees at all locations, excluding the processing plants at Center, Texas, and Glen Allen, Virginia, which locations then were, and have continued to be, under contract with United Food and Commercial Workers Union, AFL–CIO, CLC.

The raise also was not given to employees in the Holly Farms drivers-yardmen transportation department unit, which the above seven local unions had been certified to represent since March. During contract negotiations for that unit, Holly Farms had offered the Unions the 4-percent pay increase for the drivers, tied to a proposal that would leave wages as they were for a 1-year period. This offer remained on the table, unaccepted, until withdrawn by Tyson after that company assumed control.

(2) Discussion and conclusions

In *Elston Electronics Corp.*,[132] the Board restated the presumption that when an employer announces a wage increase after the start of a union's organizing campaign, the Board automatically and without further showing will presume that the increase was granted in an effort to influence the campaign and that the burden then shifts to the respondent employer to rebut this presumption. This can be done by showing that the increase would have been granted without regard to the protected union activity.[133] As indicated in *Elston Electronics Corp.*, supra, the respondent may meet this burden by showing that the pay increase would have been granted without regard to the union activity by demonstrating the existence of an established pattern of wage increases, a preorganizing administrative commitment to the increase, or any similar legitimate business justification. As stated in *Zarda Bros. Dairy*:[134]

> The unlawfulness of the granting or announcing of benefits during the Union's organizational effort depends on whether from all the circumstances, the employer's purpose was to cause employees to accept or reject the representative for collective bargaining . . . and upward revisions of employment terms are presumptively unlawful, even if made on determinations made prior to the advent of union activity.

In determining the validity of the companywide pay raise given here during the Union's campaign, it is relevant that Holly Farms' Wilkesboro employees, targeted by the Union for organization, were but a percentage of the total number of employees who were given the pay raises. In *Delta Faucet Co.*,[135] that consideration was a factor in the dismissal of a related allegation. Here, in addition to Wilkesboro complex employees, who, with noted exceptions, received the disputed pay raise, wage increments concurrently also were provided to employees at the Holly Farms' plants in Harrisonburg and Temperanceville, Virginia; Monroe, North Carolina; and Seguin, Texas. As noted, this pay raise was not given to union-represented employees in Holly Farms' transportation department and at its Center, Texas, and Glen Allen, Virginia plants. The present case, however, differs from *Delta Faucet*, supra, in that the pay raise in that matter was accelerated under a tangible need to comply with the effective date of a national inflation guideline and there had been far less antiunion animus. The size, timing, and applicability of the wage increase given here proceeded entirely at the Respondents' option and ran contrary to relevant policy declarations made in mid-December 1988, only days before the Unions' campaign became known to management.

Accordingly, while I accept that Holly Farms' business situation improved during 1989 and that employees at the Company's locations other than Wilkesboro also received the same across-the-board pay raise, the granting of these raises in the circumstances herein, just a few weeks before the representation election for the live haul employees and in the midst of a concurrent organizational drive among Holly Farms' Wilkesboro production employees, leads me to conclude that the July pay raise was timed to induce those em-

[132] 292 NLRB 510 fn. 2, 525–526 (1989).

[133] Member Cracraft's concurrence in *Elston Electronics Corp.*, supra at 510 fn. 2, was not based on her adoption of the presumption that a wage increase timed after the start of a union's campaign was unlawful but, rather, that when such a coincidence occurs ''absent an affirmative showing of some legitimate business purpose for the timing, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice.''

[134] 234 NLRB 93, 112 (1978).

[135] 251 NLRB 394, 399 (1980). In *Delta Faucet*, as here, the pay raise in issue was not given at a regularly scheduled time.

ployees to reject the Union. As noted, this pay raise not only was not scheduled,[136] but was inconsistent with the Respondent's December 1988 announcement, just before the Company concededly had learned of the organizing drive, to substitute the 3-percent bonus for any wage increases during 1989 and thereby avoid elevating the pay base and dependent benefits. Also, as argued by the General Counsel, the timing of the pay raise was inconsistent with what, until only shortly before, had been happening within the live haul department where the drivers had found it necessary to complain during their above interviews with Live Haul Manager Ray Lovette that they were unable to live on their income from 4-day workweeks. Also, while Holly Farms' business might have improved during 1989, there was no indication as to how long the good times would last, and conditions still were not sufficiently good to have deterred Holly Farms from seeking a purchaser for its business. In fact, the raise became effective just 2 weeks before Tyson's imminent takeover.

Accordingly, I find that the pay increase that became effective on July 2, as applied to live haul unit and production employees was discriminatorily given to induce its employees in the live haul and potential production bargaining units not to support the Union. In so doing, the Respondents violated Section 8(a)(1) and (3) of the Act.[137]

c. *The alleged unlawful subcontracting of transportation department drivers' work—facts and conclusions*

The General Counsel and Unions contend that since the seven local Unions' March 24 certification as bargaining representative of Holly Farms' Transportation division unit of drivers and yardmen, that the Company retaliated for its employees' selection of the Unions by increasing its use of outside freight carriers to perform hauling previously done by Holly Farms' long-distance drivers. The General Counsel and Unions charge that the disputed increase in subcontracting diminished the drivers' job security, work opportunities, and incomes.

The Respondents who, in addition to their own trucks, long had used outside freight carriers, agree that Holly Farms in 1989 did increase the work made available to outside carriers. However, the Respondents contend that this was but a continuation of a program that had been planned in detail and implemented well before the start of the Unions' organizational campaign and was carried, forward, in response to legitimate business needs unrelated to the Unions.

Long-distance drivers William Franklin Johnson, John E. Danner, Harden Branscome, Teddy Ray Hayes, and Gene Hester testified that they had lost worktime and income when Holly Farms, because of the Unions' successful campaign and its aftermath, increasingly contracted out what had been their unit work.

Johnson who, unlike the other above-named Wilkesboro drivers, was based in Glen Allen (Richmond), Virginia, testified that, in 1988 at various Holly Farms' facilities, including Glen Allen, he had seen outside carriers' trucks at Holly Farms on an average of 2 or 3 days a week, but that from the beginning of 1989 until Tyson's July takeover, outside carriers' trucks were on company premises every day.

Danner related that from December 1988, when the Unions' campaign began, until the March election, his assigned trips were about 15 percent below the corresponding period of the previous year. After the March election, the length and frequency of his runs again were materially diminished with a corresponding drop in income. During 2 weeks in April, he had one run per week where, previously, he would have undertaken approximately three trips per week. Operators of outside carriers' trucks, which he first noticed on company property during the last week in April and throughout May and June, took trips that idled company drivers had been taking to Ohio, Michigan, New Jersey, Florida, Alabama, western Tennessee, Kentucky, and Indiana. In comparison to a corresponding period during the preceding year when Danner had been driving approximately 1800 to 2400 miles per week, from the last week of April through June 1989, Danner averaged about 600 miles a week. Accordingly, his projected annual earnings, when compared to the previous year, were reduced by $10,000 to $11,000.

Driver Robert Gwyn Wyatt explained that while Holly Farms always had used outside contractors to haul its products, before the March election, such contractors had been used to haul company surplus when there was more freight than company drivers could handle. However, within 3 weeks to a month after the election, Holly Farms changed its policy to give the bulk of its freight hauling to outside carriers and the situation, from Wyatt's standpoint, thereafter worsened. While Wyatt did not retain his paystubs, he recalled that, after the election, his weekly earnings were down by $300 to $400 from what they had been done during the Unions' then recent campaign.

Driver Harden Branscome observed that from about 2 weeks after the March election and, increasingly, ''to get really bad during the summer,'' Holly Farms expanded its use of outside carriers. Outside carriers' trucks received more

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[136] Customarily, wage increases were announced in December to become effective during the following month.

[137] *Marines' Memorial Club*, 261 NLRB 1357 (1982), on which the Respondents rely, is readily distinguishable from the present situation. In *Marines' Memorial Club*, supra, the employer had followed a practice of giving its employees two pay raises a year, effective each January 1 and each July 1. In 1980, because of adverse financial reasons, the respondent in that matter delayed the January raise for 1-1/2 months, into February, and then provided a smaller increase. The employer gave the next raise early, on June 1, rather than July 1, and in amounts substantially larger than the February 15 increase. The Board found that the deviations involved in the February 15 raise were based on ordinary business considerations and that, as established by the employer's credible testimony supported by business records, the earlier June 1 raise was made possible by a dramatic improvement in its business profitability and that the June increases had been made larger to make up for the smaller prior raise which, also had been delayed by 1-1/2 months. The Board noted that the deviations that had occurred in connection with the February raise were before the start of union activities and that the changes involving the timing and amounts of the June raise were good-faith attempts on the employer's part, in view of ''dramatically'' improved business conditions, to enable its employees to recover from the delayed, smaller February increase. Here, unlike *Marines' Memorial Club*, the Respondents did not attempt to adhere to any time structure for the giving of pay increases, but rather departed not only from its own existing scheduling for granting of raises, but, also, from its announced intentions in that regard. The Respondents' generosity at the critical preelection time when the July 2 raise was given also was inconsistent with the 4-day workweek afforded live haul drivers only a short while before.

runs than did the Company's drivers. Accordingly, Branscome's paystubs show that his gross income for the first 9 months of 1989, from January 1 to September 16, was nearly $3070 less than for the same timeframe for the preceding year.

T. R. Hayes and Hester gave similar testimony about the Company's increased use of outside trucks and its impact on them. Hayes related that when he returned from a run before the March election, he would notice three or four contractors' trucks in the yard. After the election, he saw from 10 to 15 such trucks daily while Hester spotted 20. Not only did this contribute to a reduction in Hayes' gross income in the first 9 months of 1989 by more than $4900 from the same period the year before, but that, even when Hayes did get work, the situation created inconvenience. When returning from a run before the election, Hayes readily could find space within the drivers' room to do his paperwork. However, after the election, the room was so filled with outside drivers that he had no room and he had to do his paperwork at a truckstop before going on to the Company's premises.

Hester's gross earnings during April 1989 were $1815 less than for the same month in the preceding year.[138]

David G. Hayes[139] testified for the Respondents that, in March 1988, about a month after becoming Holly Farms' president, Blake Lovette decided to reduce delivery costs by making substantially greater use of outside carriers, thereby de-emphasizing and reducing the Company's truck fleet.

On March 18, 1988, about 9 months before the start of the Unions' campaign, Hayes sent a memorandum with five attachments to his then immediate superior and predecessor as vice president of transportation, Odell Whittington Jr. This document reported the results of a survey of conditions at the Company's Temperanceville, Virginia facility and set forth information pertinent to replacing the company-owned fleet with outside carriers. The detailed memorandum enumerated various considerations which, although directly related to the logistics of the Temperanceville facility, were of more general applicability. Hayes, in his memorandum, weighed the use of outside carriers over company-owned trucks with respect to company control over deliveries;[140] the costs of deliveries;[141] the percentage of Holly Farms' customers who would accept deliveries only by Holly Farms' drivers;[142] and the fact that the shortage of cooler space inside the Temperanceville plant and at other company facilities made necessary the use of company-owned refrigerated trailers for storage, reached certain conclusions and made certain recommendations. Hayes concluded that the argument whether company drivers or outside carriers would do a better job always would exist because both could get the Company's product to the market on time. However, he noted that company drivers could be controlled while outside carriers could not; that the results of customer relations and costs from failure by an outside carrier's driver were much worse; and that while company drivers could be dealt with and problems terminated; the services of an outside carrier could only be eliminated, creating a need to find a replacement. Nonetheless, Hayes concluded that the cost and capital savings from increased use of outside carriers made such a process viable and he recommended a series of measures to put such a scheme into effect. These included gradually eliminating the Temperanceville-domiciled tractor fleet as dependable carriers can be found.

After completing his March 18 memorandum, Hayes discussed that document with President Blake Lovette, who expressed the desire to pursue increased use of outside carriers while de-emphasizing the use of company-owned trucks. Accordingly, between March and May 1988, Hayes, as directed by Lovette, prepared an annual operating plan for various Holly Farms' locations showing projected quarterly savings on outside carrier usage during the Company's coming June 1 through May 31 fiscal year. At the time the operating plan was developed, Holly Farms was using its own trucks to make approximately 80 percent of its deliveries and outside carriers for the remainder. Projecting gradual diminution of the use of company-owned trucks at Holly Farms complexes during each quarter of the Company's fiscal year, Hayes anticipated appreciable savings as the percentage use of outside carriers commensurately was gradually increased.

To make the projected operating plan a reality, Hayes prepared a written plan of action, dated May 26, 1988, and sent the then outhaul manager, Barry Wood, to each of the Holly Farms' Virginia locations where Wood reviewed the 1989 projected operating plan with the respective dispatchers, listened to their problems, on occasion met with outside carriers' representatives and secured the lead dispatchers' commitment to the plan. Additional steps were taken and Wood

[138] The above diminutions in drivers' earnings from 1988 to 1989 were not caused solely by decreased work from subcontracted freight hauling. As noted, during 1988, Holly Farms had taken certain other actions to reduce the pay of long-distance drivers. These steps included the elimination of pallet pay and the reduction of holiday and of waiting time pay.

[139] Hayes, who had held positions of increasing responsibility with Holly Farms since joining that Company in 1977, became operations manager of Holly Farms' transportation division in 1987, and that division's vice president on June 1, 1988. Effective September 24, after Tyson assumed control, Hayes became eastern division manager, Tyson Transportation.

[140] Holly Farms, in this regard, could exercise greater disciplinary control over its own drivers, making recurrent infractions less likely. However, when outside carriers' drivers did not fulfill established Holly Farms' requirements, the contractors could be compelled to pay only monetary penalties which, over time, added up without satisfactorily addressing basic problems.

[141] One cost referenced in Hayes' memorandum is that Holly Farms, in operating its own trucks, paid for round-trip deliveries while outside carriers charged only for one-way deliveries. This was somewhat offset in that outside carriers, in billing Holly Farms, would factor in their costs in deadheading (returning without freight). Another cost factor was off-loading. This would occur when an outside truck was not available at a Holly Farms plant when perishable product was scheduled to be loaded. In such cases, it would be necessary to first load the product into refrigerated company-owned trailers and, when the outside truck appeared, to off load from the company trailers onto the outside carriers' trailers. As indicated in Hayes' memorandum, off-loading was not beneficial because it tied up the loading dock, caused additional labor expenses, and, occasionally, resulted in product damage.

[142] The survey reported in Hayes' memorandum that 14.1 percent of Temperanceville loads were necessarily delivered by Holly Farms' drivers because, if company drivers were not available, the customers involved would have to be separately persuaded to accept delivery by an outside carrier. This was because company drivers, more appreciative of the customers to the Company's business, established relationships and tried harder to meet the customers' requirements.

obtained local commitments for reductions of tractors and trailers at Temperanceville and Glen Allen by June 20, 1988. Hayes conveyed the results of Wood's Virginia trip so Lovette in a June 15, 1988 cover memorandum to Wood's more comprehensive report.

On June 1, Hayes succeeded Odell Whittington, who had retired as vice president of the transportation division on June 1. That month, the first reductions in the Company's fleet were made. Four tractors were eliminated and four drivers were laid off from Glen Allen; eight tractors and four drivers were taken from Temperanceville; and, at Wilkesboro, four tractors, but no drivers were eliminated.

Hayes suffered a heart attack on June 16 and did not return to work until August, parttime, and fulltime in September. Whittington, recalled from retirement to substitute for Hayes, instead of continuing to reduce the size of the fleet, began to reverse that process. Further fleet reductions did not again occur until after Hayes' return. By memorandum, dated July 11, 1988, from Blake Lovette to Whittington and Hayes, issued in Hayes' absence, Lovette stated that his view that Holly Farms had too much power equipment and that it was being under utilized. Lovette requested a brief report on weekly power equipment utilization with a view to moving from the then current 98,000 miles/year level usage to 130,000 miles/year. He also requested a plan to reduce the Company's tractor fleet by about 30 power units.

Hayes described transition-delaying problems experienced in obtaining appropriate carriers. These included difficulties in hiring carriers willing to run out of certain traffic lanes in order to enable Holly Farms to get better coverage in areas it served around the country; in finding carriers that met insurance guidelines; and in obtaining carriers that would drop off refrigerated trailers on the Company's lot before arrival of the tractors, thereby adding to the Company's storage capacity, which was in short supply at the plant. Hayes also cited his own inexperience.

The next fleet reduction occurred in January 1989, with the elimination of two tractors and two drivers' jobs.[143] In May, the following further reductions were made:[144] Harrisonburg and Glen Allen, respectively—four) tractors retired and four drivers laid off; Wilkesboro—six tractors retired and approximately four drivers laid off.[145]

Company records reveal that, from the weeks ending July 30, 1988, through July 15, 1989, Holly Farms used outside equipment for an average of 16 percent of its delivery runs. During the first 35 weeks of that period, from the week ending June 30, 1988, through the week ending March 25, when the Board certified the Unions as bargaining representative, Holly Farms' use of outside equipment averaged 14.5 percent. In the 15 weeks that followed, this figure increased to an average of 18.9 percent—an average increase since the certification of 4.4 percent.[146]

Hayes, in a June 7 memorandum to Pete Lovette, Holly Farms' treasurer,[147] outlined a plan for upgrading the Company's current outside carrier group to provide improved levels of service and timeliness of deliveries; to increase the number of available outside carrier power units to the plants; and to decrease the amount of off-loading between Company and outside trailers, and to achieve other purposes.

Blake Lovette explained that factors causing increased reliance on outside carriers during 1988 and 1989 were: (1) that Holly Farms' costs per mile were higher than the entire industry average and, in many cases, the product could be hauled more cheaply by contract carriers than by use of company-owned equipment; (2) that Holly Farms' attempts at running its equipment on additional revenue (loaded) miles resulted in tying up the Company's equipment for longer periods so that, with the same number of trucks, fewer were available in which to haul chickens; and (3) that certain tractors were sold and not replaced in accordance with Holly Farms' stated objective of eventually hauling about 65 percent of its own product in company-owned vehicles and using independent contractors to haul the remainder. Since, as noted, the Company's refrigerated trailers also were used for additional storage at the plants, their numbers were not affected by these reductions.

Hayes explained that factors determining whether loads would be carried by outside contractors as opposed to company—owned trucks included the volume of product loads to be delivered; the availability of outside carriers, as affected by seasonal considerations and by holidays; the presence of company equipment which had to be kept moving; and the availability of carriers to go to the required areas. It was particularly necessary to use company carriers when business was slow or when outside carriers were not accessible. Holly Farms also preferred to use its own trucks on trips where backhauls were indicated.

Hayes testified that by reducing its fleet and using outside carriers, Holly Farms was able to lower its costs, although deliberately trading off some company service capability. He explained that the cost-efficiency in increased use of outside carriers was exemplified by the practice of other companies in that industry with whom Holly Farms then competed. For example, Perdue Foods hauled half its deliveries on its own trucks and contracted the rest. Valmac Industries, a Tyson subsidiary where Blake Lovette earlier had been president, and Conagra, Inc., a large food company with a 9-percent share in the domestic chicken market, did not use their own vehicles, while Tyson hauled only about 30 to 35 percent of its own product on their own trucks.

In agreement with the General Counsel, I have found above that, before the March representation election, various Holly Farms officials repeatedly made unlawful threats to long-distance drivers that the Company would close its transportation department, contract its hauling to outside carriers, and take away its employees' jobs if they chose the Unions to represent them—in sum, that the Company had threatened that it would do precisely what it is now charged with having

[143] Hayes admitted to first learning of the Unions' organizing campaign among the Company's transportation department employees on December 23, 1988.

[144] The Company initially had proposed the May reductions to the newly certified Unions in March, but delayed implementing them until May because the Unions had delayed this response. The parties agree that Holly Farms, before Tyson assumed control, had bargained in good faith on the matter of increased use of trucking contractors and related reductions in the Holly Farms fleet.

[145] Although the Company had planned to lay off a total of nine Wilkesboro drivers, attrition had reduced the number of necessary layoffs.

[146] As noted, in mid-July, Tyson assumed control of Holly Farms.

[147] As noted, Pete Lovette formerly had headed the transportation group.

done. However, in application, the weight of the credible evidence, supported by substantial documentation, shows that Holly Farms' increased use of contract carriers after the March representation election actually was consistent with long-term plans and policies that had been conceived in detail and which had commenced well before the start of the Unions' organizing campaign, and also that its actions in this regard were consistent with the practices of other employers competing in the same industry. The Company's increased use of contractors, therefore, was based on a demonstrated business need to become competitive in its delivery costs, rather than on its well-established desire to defeat the Unions. It further is noted that after the Unions were certified as bargaining representative, the Company bargained in good faith on the matter of outside contractors and that, during the 15 weeks that followed the Unions' certification, the increase in the use of outside carriers was a controlled 4.4 percent.

Therefore, as the General Counsel has not established by a preponderance of the evidence that the Respondents increased their actual use of contract carriers for hauling in retaliation for its employees' having selected the Unions to represent them, I find that the Respondents did not violate Section 8(a)(1) and (3) of the Act in this regard.

d. *The alleged discriminatory reductions in drivers' earnings—facts and conclusions*

The General Counsel contends that by their subcontracting practices, the Respondents discriminated against long-distance drivers Gene Hester, Robert Gwyn Wyatt, Harden Branscome, Teddy Ray Hayes, and John Danner by dramatically reducing their earnings in early 1989 from what they had been during corresponding periods of the preceding year. This alleged unlawful conduct assertedly followed receipt by Holly Farms' president, Blake Lovette, of a December 29, 1988 letter from Union Organizer R. W. Brown in which these men and six others, all employed in the Holly Farms transportation department, Wilkesboro, were identified to management as members of the Unions' in-plant organizing committee. As discussed more fully above, all of the five above-named drivers were unlawfully threatened by company officials that the transportation department would be closed, that hauling work would be contracted to outside carriers, and that their jobs would be lost if the employees selected the unions to represent them. These employees also were subjected to other unlawful conduct.

The record shows, also as more fully described above, that each of these men were active union supporters and that, after the Unions were certified following the March election, Wyatt attended at least five negotiating sessions as a member of the Unions' committee. Wyatt, too, as found above, had been subject to threats of retaliation by driver-coordinator John Sloop in the drivers' room in the context of his union activities following his accident while driving on an icy, snow-covered road and, shortly before that incident, he had turned down Sloop's suggestion that he forgo the Unions and join in a committee to negotiate with management.

Pay records show that in January and February 1989, Danner averaged, respectively, $358 and $72.50/week less than during the same months of the preceding year. Wyatt, during those same months, averaged, respectively, about $111.39 and $275/week less than during the same weeks of the corresponding months of the preceding year. Branscome's paystubs showed that for about the first 9 months of 1989, his gross earnings were $3,069.37 less than during that period of 1988, while Teddy Ray Hayes' stubs for approximately the same period in 1989 showed gross earnings that were down from the corresponding 1988 interval by $4,916.40. There was evidence of further earnings reductions for Wyatt and Danner in 1989.

While the foregoing facts and figures, in the context of the Respondents' other above-found unlawful conduct affecting these same employees, create suspicion of discrimination, particularly in view of the size of the pay reductions, they do not prove by an evidentiary preponderance that discrimination, in fact, occurred. The record shows that these five employees were not alone in having been identified to management as active in the Unions' campaign. In a series of four letters, respectively dated December 29, 1988, February 20 and 27, and March 6, 1989, to Holly Farms President Blake D. Lovette, Union Organizer R. W. Brown named, including the above 5 men, a total of 52 Wilkesboro employees as members of the Unions' in-plant organizing committee. In that correspondence series, the Unions also so identified 6 Glen Allen employees, 11 Monroe employees, 18 Temperanceville employees, and 1 employee at Harrisonburg. As noted, the initial December letter, in addition to naming the five men asserted as discriminatees, also identified six other Wilkesboro in-plant organizing committee members. The record does not indicate that any of these many other spotlighted union adherents were comparably discriminated against or that the earnings of Branscome, Wyatt, Hester, Hayes, and Danner, however, lessened for 1989 as compared to 1988, had been reduced below the compensation for other similarly situated transportation department employees during the times in question. While these five employees plainly have earned substantially less than in comparison periods, there is no showing that, in their earnings, they were treated differently than were other employees in their category. Noting too, that I have found above that the Respondents did not violate the Act by its actual, as opposed to its threatened, contracting polices, I find that the Respondents did not violate Section 8(a)(3) and (1) of the Act by using those contracting practices to reduce the earnings of Teddy Ray Hayes, Harden Branscome, Gene Hester, Robert Gwyn Wyatt, and John Danner.

D. *Events Occurring After Tyson's July 18 Takeover*

1. Refusals to bargain concerning drivers-yardmen unit—facts

a. *Bargaining between March—July*

On March 24, 1989, following an election in Case 11–RC–5571, the seven above-identified Teamsters locals (the Unions) were jointly certified as bargaining representative for Holly Farms employees in the following unit:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas, facilities; *excluding* all office

clerical employees, and guards and supervisors as defined in the Act.[148]

Holly Farms and the Unions met in about 12 contract negotiating sessions between April 11 and June. The parties are in agreement that these negotiations were conducted in good faith and that at the time of the July 18 stock purchase by Tyson,[149] the parties were continuing to attempt to reach agreement. During these negotiations, Attorney Jesse S. Hogg served as chief spokesman for the Company while Bruce D. Blevins, secretary-treasurer of Teamsters Local 391, filled that role for the Union.

At Hogg's suggestion, the parties agreed to reschedule negotiating sessions that had been set for July 10–12 to gain additional time in which to clarify Holly Farms' status and bargaining position as Tyson had successfully bid for Holly Farms' stock and was about to assume control. On July 18, Hogg contacted Blevins and advised that he would continue as company spokesman and the parties set August 8, 9, and 10 negotiating dates.

Charles Clark Irwin[150] testified that 5 years earlier, he had met with Pete Lovette, then head of the Holly Farms' transportation group and who later become that company's treasurer. As a result of this meeting, Irwin learned that Holly Farms was losing money, a situation which continued into 1989. Tyson's initial bid for Holly Farms was made around mid-October 1988 and while the acquisition process continued, in response to an inquiry by Don Tyson, Tyson's board chairman and chief executive officer, as to how Holly Farms' transportation decision might be integrated with Tyson and for a rejection of the economic result, Irwin and Mike McNeese, Tyson's director of transportation, prepared a projected operating plan, dated January 24, which broadly outlined how the two transportation divisions might be merged.[151]

On July 14 and 15, key Holly Farms management personnel and the representatives of Tyson management group from Springdale, Arkansas, met in Atlanta, Georgia, for a general introductory meeting and to exchange ideas. During this meeting, the status of Holly Farms' collective-bargaining negotiations with the Unions was discussed as was a document describing Tyson's long haul transportation corporate philosophy and goals, prepared by Irwin 2 weeks before.[152] No decisions were taken at the Atlanta meeting.

b. *The August 8 negotiating session*

The Respondents and the Unions met as scheduled on August 8 at a motel in Greensboro, North Carolina. The events of this meeting, jointly attended by 20 company and union representatives, are not in dispute. Hogg continued to serve as the Respondents' spokesman while Blevins filled that role for the Unions. Hogg announced that the Tyson representatives, at negotiations for the first time, were present for informational purposes. Hopefully, they could answer questions as to the decisions that were to be presented and implemented.

Hogg told the union representatives that Holly Farms was now fully owned by Tyson Foods, Inc., which had purchased the entire Company and had taken full control over the Holly Farms' operations. Tyson, having examined the situation, was going to make some changes. The Seguin, Texas plant, part of Holly Farms western division, was going to be converted from a fresh poultry plant, to be blended into the Tyson operation as a fast food or institutional-type plant. The 14 drivers, members of the Unions' bargaining unit, who were based at that plant, would be given the opportunity to work for Tyson. Hogg explained that those drivers would not be employed by Holly Farms but would be dispatched from a central point, not yet established, in northeast Texas.

Hogg announced that the Holly Farms' plant at Center, Texas, the other segment of Holly Farms western division, would continue to be a pressed poultry plant, but would be put into the Tyson operation. Of the 25 Holly Farms drivers domiciled at Center, 18 or 19 would be given the opportunity of working for Tyson and the remaining drivers, in excess of these 18 or 19, would be laid off as Holly Farms drivers, subject to recall as determined during further negotiations.

Both the Seguin and Center drivers would be dispatched from a central point to be established in northeast Texas. Neither group would be required to change their residences. As under Holly Farms, these drivers could take home their trucks if they lived in the area or, at their option, could leave their trucks at their respective plants.

Hogg announced that Tyson was not going to integrate the eastern operations into Tyson although, if Tyson had so desired, it was Hogg's position that they could. Instead, Tyson was going to operate these eastern operations as the Holly Farms Foods Fresh Retail Division. Hogg emphasized that the Holly Farms' brand name was famous and one which Tyson desired to maintain. However, Tyson did intend to make certain changes with regard to the eastern operation; it was going to reduce the number of drivers and tractors operating in the east. He told the Unions that Tyson was going to reduce the number of tractors by 47 and was going to reduce the number of eastern drivers by 71.

Blevins, for the Unions, objected to the reduction of eastern division drivers, accusing the Respondents of wanting to have more of its product hauled by outside carriers and less hauled by company drivers.

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[148] On March 9, 10, and 11, when the election in Case 11–RC–5571 was conducted, there were about 299 drivers in the unit. On September 12, when the General Counsel and Union assert that the Respondents withdrew recognition from the unit, the Respondents employed 209 unit drivers and about 45 yardmen—35 in the eastern division and approximately 10 in the western division.

[149] Tyson learned on July 14 that its purchase bid for the purchase for Holly Farms' stock would be successful.

[150] Irwin, with Tyson since 1978, was Tyson's group vice president, distribution and commodity purchasing, based at Tyson's headquarters in Springdale, Arkansas. At the time of the hearing, Irwin was responsible for Tyson's transportation and warehousing functions and for all ingredient and commodity purchasing that went into the production of feed at Tyson Foods' 13 feed mills.

[151] Tyson's acquisition of Holly Farms also included various Holly Farms subsidiaries which, although substantial enterprises, are not germane to this proceeding.

[152] This documented statement of Tyson's general philosophy for owning and operating its fleet first presented Holly Farms' executives with ideas later put into effect when the Holly Farms transportation division was incorporated into the Tyson transportation system. Briefly, for a number of specified reasons, it was Tyson's purpose to move between 25 to 35 percent of its volume in its own trucks. The Holly Farms group first also learned of the Tyson fleet manager dispatching concept, which will be described below.

Hogg informed the Unions that the facilities to be affected by those reductions would be at Wilkesboro, Monroe, and Temperanceville. The Company would add additional tractors to the other Virginia facilities. Hogg also advised the Unions that the Company was withdrawing the proposed 4-percent pay increase during a 1-year contract that Holly Farms had placed on the table during the June 22 negotiating session and presented a revised proposal that pay remain unchanged during a 1-year agreement. The Unions protested then and at subsequent meetings that the Respondents were making those proposals to pressure and bring hardship on employees who had elected to be represented by the seven Teamsters locals.

The parties continued to negotiate contract proposals for the remainder of that session.[153]

c. *The August 9 and 10 negotiating sessions*

The Respondents' and the Unions' representatives met again on August 9 at the same place and spent most of that day discussing contract proposals.[154]

On August 10, the parties met again. Hogg advised the Unions' representatives that the Center, Texas drivers who, on August 8, he had said would be laid off as Holly Farms' drivers, would be offered employment with Tyson. They no longer would be Holly Farms' drivers, but would receive their dispatches from Arkansas. The remainder of that session was spent negotiating contract terms.

d. *The August 21 negotiating session*

On August 21, representatives for the Respondents and the Unions conducted another contract negotiating session at the same Greensboro location. Hogg and Blevins again served as the principal spokesmen. That meeting also was attended for the first time by Victor de la Fuentes, the business agent for Local 657, San Antonio, Texas, which local had jurisdiction over Seguin, Texas. At that meeting, Blevins stated that it was the Unions' position that the Respondents were eroding the unit by their previously stated intention of merging the Texas division into Tyson's operations and by reducing the work force in the eastern division while giving the freight to outside carriers. He again accused the Respondents of taking those actions in order to pressure unit employees in retaliation for their union activities. Hogg denied that these measures were retaliatory and advised that he had been in touch with the powers that be and that they were going to have their program in effect no later than by November 1. By that time, the reductions in eastern division drivers and equipment would be in place. Hogg reiterated that Tyson was going to reduce the number of outbound miles for eastern truckdrivers so that they would be hauling products within only a 450-mile radius of their respective terminals. These drivers would not be making hackhauls or, if any other party made a backhaul, it would only be on Tyson or Holly Farms products. This would save the drivers some delay time at pickup points, since they no longer would have to wait for backhaul loads.

Blevins stated that this sizeable reduction in the driver force was not acceptable to the Unions. He asked the Company to reconsider its plans, to maintain the driver force as it was, and not to take the Texas employees out of the bargaining unit. The Unions reiterated that these actions were unlawful and were being done in retaliation.

During the August 21 meeting, Blevins asked who would be hauling the product from the Center and Seguin terminals if the Company took the Holly Farms' drivers out and put them in the new facility. Hogg replied that, more than likely, this would be done by drivers formerly employed by Holly Farms and, on occasion, by a Tyson driver who might come through the area.

Answering Blevins' inquiry as to the seniority status of Holly Farms' western division employees who were being put into the Tyson transportation system, Hogg stated that he would not make any commitment. However, Hogg reassured the Unions that such drivers would not be discriminated against and would be treated as were the other Tyson drivers. When Blevins asked how the Tyson drivers were treated, Hogg replied that they were not there to negotiate for Tyson; they were there to negotiate for Holly Farms. When Blevins pointed out that Howard Baird, the Tyson Foods' vice president for industrial relations, was present and that he would know how seniority was applied in the Tyson transportation division, Hogg answered that Baird was not there to negotiate, but only to provide information or answer questions that Hogg might have.

e. *The August 22 negotiating session*

On August 22, essentially the same parties met again at the Greensboro motel. On that occasion, Hogg advised the Unions that the Company was going to go ahead with its plans to reduce the work force in the east and that, in a couple of days, it would be sending out letters to eastern employees and would be laying off the 71 drivers. The Unions again unsuccessfully asked the Respondents not to lay off these people because of the asserted unavailability of freight since that freight otherwise would be hauled by outside carriers.

Hogg, however, answered Blevins' question of the day before concerning the Texas drivers' seniority. Hogg assured the Unions that Tyson did recognize the seniority and vacations of the Holly Farms drivers who would be integrated into the Tyson operation, both for long-distance drivers and for the shuttle (local) drivers.

During the August 21 and 22 sessions, the Respondents did provide the Unions with requested copies of the Tyson pay and benefits plans and advised what these plans were. The Unions had been told during the August 8 meeting that, when integrating the Holly Farms drivers into the Tyson transportation system, all drivers would be paid in accordance with the Tyson pay plan.

When Blevins asked what would happen to Holly Farms' yardmen after integration, he was told that the Tyson system did not use yardmen to hook up or to unhook trailers from tractors.

The parties spent the remainder of the August 22 session negotiating contract terms and agreed to schedule additional meetings on September 12 and 13.

[153] Hogg's announcements to the Unions on August 8 followed instructions he had received from Blake Lovette in furtherance of decisions taken during a July 21 meeting of Tyson and Holly Farms executives at Tyson's Springdale general corporate offices.

[154] On August 9, Lankford sent a memo to four supervisors summarizing the above changed operating plans for Texas drivers and requesting that such changes be communicated to the affected transportation employees at Center and Seguin.

However, the Respondents' decisions, announced to the Unions during the August 8 through 10 meetings and further discussed later that month, to the effect that Holly Farms would only be partially merged into Tyson; that the Holly Farms eastern division would be reduced by 71 drivers and 47 tractors; and that a 450-mile outhaul limit would be applied at Holly Farms east, with an elimination of backhaul, never actually were effectuated. Between the August 21–22 sessions and that scheduled for September 12, the Respondents gradually decided that there would be substantially more backhaul work available than previously had been projected. This revised estimate arose from new information, encapsulated in an August 24 memorandum by David Hayes[155] to Blake Lovette.[156]

Accordingly, at a September 11 meeting in Wilkesboro of senior Tyson executives and those who had been with Holly Farms, a decision was finalized to fully integrate the total Holly Farms transportation division—east and west—into Tyson transportation because of three flaws in the original plan: (1) it was impossible to predict how many loads from a given facility would be within the 450-mile range and how many would be outside; (2) during the 2 months that had lapsed, it had become evident that there would be sufficient freight available to make unnecessary the announced reductions in eastern personnel and equipment; (3) and since Tyson already had taken over Holly Farms, it was decided that it was best simply to fully integrate the two operations. Hogg was directed to announce the Respondents' revised position to the Unions at the negotiating session scheduled for the next day.

f. *The September 12 negotiating session*

On September 12, as scheduled, the parties met at a different Greensboro motel. The Unions were represented by Blevins and members of their negotiating committee. Hogg; Irwin; Hayes; Howard Baird, Tyson vice president and director of industrial relations; Bill Travis, Tyson's director of personnel; and Mike McNeese, in charge of the Tyson transportation system, appeared for the Respondents. As before, Hogg and Blevins served respectively as spokesmen for the Respondents and Union.[157]

Hogg opened the meeting by advising the local unions that before going further, he had an announcement to make. First, he had some good news for the Unions. The Respondents had taken a survey and discovered that there was more backhaul freight available than was previously known. Because of this, the Company was not going to lay off 71 drivers, as initially proposed. However, the Respondents were going to integrate the Holly Farms eastern division drivers, as well as the Texas (western) division drivers into the Tyson transportation department. For all intents and purposes, these drivers would become Tyson drivers and would be paid under the Tyson payscale.[158] However, they would continue to receive the Holly Farms fringe benefits they then were getting as provided in the merger agreement between Holly Farms and Tyson. However, the Holly Farms drivers, after integration, would have the same payscale as the Tyson transportation drivers. Hogg reiterated that there no longer would be Holly Farms transportation drivers—they all would become Tyson drivers. He declared that Tyson would be sending letters to all Holly Farms drivers, including the 71 eastern drivers previously notified that they were being excessed, announcing their opportunity to work as Tyson drivers.

Blevins asked when the Respondents were going to take these actions. Hogg replied that the Company was going ahead that morning with its plans as put on the table. The Unions then requested a caucus.

After caucusing for approximately 20 minutes, Blevins advised the Respondents' representatives that the Unions had serious disagreement with their proposed plans and requested answers to certain questions. Blevins asked Hogg who had made the decision to integrate the entire Holly Farms transportation division into the Tyson transportation system. Hogg replied that he did not know, not having been there, but did not feel that Blevins would get this information. In response to Blevins' question as to when the decision had been made, Hogg stated that he did not feel that Blevins was entitled to that information but that the decision had been made between the time of their last meeting on August 22 and the present September 12 session. When Blevins asked the reason for the decision, Hogg advised that the Company wanted to have more of its freight hauled by outside carriers and wanted to be able to fill up the empty miles with backhauls using Tyson drivers, including those to be integrated into Tyson transportation. The Unions asked for any documents used or material data related to the making of these decisions. Hogg stated that he would take this request under advisement but, in his opinion, Blevins was not entitled to this information and would not get it.

Blevins also asked Hogg for a copy of the referred-to merger agreement between Holly Farms and Tyson. Hogg again told the Unions that he did not think that they were entitled to this and might not get it. As of the hearing dates, the Unions had not received a copy of the merger agreement, although as will be discussed, a relevant provision from that document was sent to the Unions in later correspondence.

When Blevins asked if it was the Respondents' intention to integrate any of the other Holly Farms divisions or classifications into Tyson, Hogg replied not to his knowledge. In response to Blevins' question as to what the Company would do with the yardmen,[159] Hogg answered whatever was feasible. Replying to another inquiry from Blevins, Hogg ad-

[155] Hayes, vice president of the Holly Farms' transportation division, as noted, became eastern manager of Tyson Transportation on September 24.

[156] Lovette, who until the takeover had been Holly Farms' president, in August was president of Tyson's fresh retail division. This title later was changed to vice president.

[157] The events occurring at the September 12 meeting essentially are undisputed and, as described; synthesize the testimony given by witnesses from each side.

[158] Under the Tyson pay plan, drivers earned different mileage rates based on their service time with Tyson, on a progression of 0–3 years. The Unions were told that Holly Farms drivers being merged into Tyson would receive credit for their Holly Farms service in tenure of their placement in that progression. As will be discussed, Tyson's payment per mile to its drivers was less than Holly Farms' mileage rate for its eastern drivers.

[159] As noted, at the time, there were about 35 yardmen in the Holly Farms eastern division and about 10 in the western division.

vised that Holly Farms' local drivers also would be offered jobs with Tyson.

Hogg repeated that the company representatives were not there to negotiate about where the drivers would go, but about the impact. Blevins responded that the Unions' representatives were not going to negotiate that day on impact because they did not feel it appropriate and they also did not have the necessary information that had been requested. Blevins asked if the Company was refusing to bargain with the Unions. Hogg answered, no, the Company was willing to bargain concerning the impact of this decision but was not willing, at that time, to bargain concerning its decisions.

During that meeting, Hogg informed the Unions that the Respondents' plan was to no longer have a Holly Farms transportation division; that that division was going to be integrated into Tyson transportation; and that, therefore, the Unions no longer represented the employees.[160] However, it is undisputed that neither Hogg nor any company representative told the Unions in so many words that Holly Farms was withdrawing recognition as of September 12. However, as Irwin attested, the Company's statement of its willingness to continue to recognize and bargain with the Unions related solely to bargaining with respect to impact of the Respondents' announced decisions. Blevins' response was angry. He told the Respondents' representatives that they would bargain with the Unions; that the Unions had been elected and certified to represent the drivers and that the Unions would not go away. As the meeting ended, Blevins told Hogg that the Company did not have a right to decide to bargain only over the impact of its decisions. Hogg answered that this was a legal matter and suggested that Blevins have his attorney contact him. Blevins reiterated his protests that the Company could not make those decisions, and that he was going to defend and represent the unit people at whatever costs. He promised that the Unions' attorney would contact Hogg.

There were no further discussions concerning a new contract that day, and September 12 was the parties' last negotiating sessions.

g. *The September 12 job offer to unit drivers*

On September 12, at the conclusion of the negotiating session, Hayes, over his signature as vice president of the Holly Farms Foods, Inc., transportation division, on that Company's stationery, sent copies of the following letter to all Holly Farms drivers:

> Tyson Foods, Inc., has decided to assume all long-distance transportation functions and responsibilities related to Holly Farms operations.
>
> All current Holly Farms Transportation Division drivers are to be offered employment with Tyson Foods, Inc. Transportation Department, as Tyson drivers, under the Tyson Pay Plan. Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement. Tyson will recognize length of service at Holly Farms, as required under Tyson policies.
>
> Please contact John Sloop on or before September 22, 1989, for your processing to become a Tyson Foods employee.

h. *Direct negotiations with unit drivers*

In accordance with the parties' stipulation, I find that after the September 12 negotiating session and mailing of copies of the above letter to drivers offering them jobs with Tyson, Tyson and Holly Farms management and personnel representatives met with small groups of the long-distance drivers. At these gatherings, the Tyson representatives explained the terms and conditions of employment applicable to Tyson drivers, under which the recipient drivers would be working if they accepted the offer. These meetings began on September 12 after the negotiating session had ended and continued.[161]

i. *The alleged constructive discharges of 47 unit drivers*

In accordance with the parties' stipulation, I find that the 47 long-distance drivers named below were among the 209 drivers to have received David Hayes' above September 12 letter offering them employment with Tyson under new terms set by Tyson and that, for reasons consistent with the testimony of long-distance drivers Donald Ray Kanupp, Fred Royal, and Curtis Eastridge, these 47 drivers rejected the employment terms set forth in that letter and did not continue to work for Tyson.[162] The other drivers who received the September 12 job offer accepted.

The 47 drivers who refused the September 12 offer, alleged as constructively discharged in violation of Section 8(a)(1), (3), and (5) of the Act, were:

Earl Howell	Bryant Welborn
Butch Miller	Jerry Fisher
Harden Branscome	David or Danny Howell
Fred Royal	James Spicer
Gene Hester	R. J. Ahsher
Bill St. John	Jerry Mealy
Gene Harris	Mike Hamby
James Sparks	Clark McNeil
Mike Dancy	Patrick Owens
Danny Osborne	Mike Maudlin
George Barber	Earl Eller
Thomas Roope	Donnie Blackburn
Bill Ray Johnston	Thomas Alexander

[160] As Tyson transportation, before the takeover, had approximately twice the number of drivers than had Holly Farms, if, as argued by the Respondents, the merger of the two transportation systems was lawful, the Unions no longer would have majority support in the combined group.

[161] Irwin and Hayes testified that these meetings with Holly Farms drivers continued through September 22. As described by Lankford, at meetings he attended with David Hayes and Howard Baird, Tyson's vice president for industrial relations, after Hayes had explained the Tyson system, its work rules, procedures, and, generally, how things would be when integration took place, Baird would answer questions. At each of these meetings, questions arose as to what would happen to the Unions. Baird's reply was that, once the Holly Farms and Tyson transportation departments were integrated, the Teamsters Union no longer would have a majority of employees in the department they represented and, therefore, would no longer be the employees' representative.

[162] As noted, when the September 12 offer was made on Holly Farms stationery, rather than that of Tyson as the prospective employer, Tyson had been in control for approximately 2 months.

Teddy Ray Hayes	Jerry Blackburn
David Laney	Jerry Miller
Dan Wingler	Larry Eldreth
Steve Eller	Kenneth Eller
Zane Filipic	Michael Simmons
Ray Kanupp	Donnie McClary
Curtis Eastridge	Sam Badgett
Denny Patrick	Mike Staley
George Glass	David Anderson
Donald Dollar	Robert Crook
Romey Nelson	

Eastridge testified that, after receiving his copy of the September 12 letter as an enclosure with his paycheck, on September 13, he spoke to Lankford by phone. Lankford, in answering Eastridge's questions, told him that if he worked for Tyson, Eastridge would be expected to be on the road for from 10 days to 2 weeks at a time[163] and that he would receive Tyson wages, not Holly Farms wages. Eastridge replied that the Unions represented him and that he was not signing on to work for Tyson at a lower wage rate than what he then was earning. Lankford told Eastridge that if he did not sign, he would not be called to work after September 22. Eastridge emphasized that he wanted to make clear for unemployment compensation and other purposes that if the Company refused to call him to work, it would be terminating his employment—he was not quitting. Lankford answered that the Company would look at it differently; that he was quitting.

Kanupp testified that, after receiving the letter, on September 20, he phoned driver-coordinator John Sloop, to whom responses were to be directed and declared that he was not going to sign the letter and take another decrease in pay. Sloop suggested that Kanupp stop by his office and talk to him. When Kanupp did so later that day, he again told Sloop that he could not sign the letter to take another decrease in pay. When Sloop suggested that he try it, Kanupp said no.

Royal, too, received the September 12 employment offer. He related that during the evening of September 22, dispatcher Rex Grider[164] called and told Royal that if he did not sign the paper by midnight, he no longer would be called to work. When Royal asked if he was fired, Grider told him, no, it would be a voluntary quit. Royal stated that he had not quit, but Grider told him, ''We will not call you anymore.''[165]

j. *Continued refusal to furnish the merger agreement; parties' positions; and withdrawal of recognition from the Unions*

After the September 12 negotiating session, the parties, in a series of letters to each other during which the Unions continued to seek a copy of the Respondents' inter sese merger agreement first requested on September 12, explicated their respective views on the disputed bargaining obligation as it related to the drivers-yardmen unit. In this correspondence, a summary of which follows, the Respondents also withdrew recognition from the Unions.

By letter, dated September 15, to Respondents' attorney Hogg, Merl E. Kelly, chairman of the Unions' negotiating committee, asked for various items of information, including the Tyson Foods/Holly Farms merger agreement,[166] previously requested orally by Blevins during the September 12 negotiating session. In his letter, Kelly stated that the date sought was necessary to enable the Unions to perform as bargaining agent.

Hogg, in his September 20 reply, after defending against various statements by Kelly, rejected the Unions' request for all documents on grounds that it did not appear that any of the requested information related to legitimate bargaining objectives and that the Respondents did not believe that the Unions were entitled to the requested documents. Hogg reiterated his willingness to discuss the Unions' entitlement to such information with their attorney.

By letter, dated September 19, to Don Tyson, Tyson's chairman and chief executive office, Springdale, Arkansas, and to Lankford, Union Secretary/Treasurer B. D. Blevins put the Respondents on notice that the drivers and yardmen in the certified unit, having been required in the September 12 letter to sign a statement accepting employment with Tyson or be considered to have resigned their employment, had not waived their rights under the Act by having signed such a statement. In his letter, Blevins also demanded that Tyson meet with the Unions to negotiate a collective-bargaining contract covering the employees in the drivers-yardmen unit, and to continue the employees under their then current employment terms until such a contract was reached. Finally, Blevins demanded that the Respondents bargain with the Unions over both the decision to move the employees from Holly Farms to Tyson, and as to the effects of that decision. Blevins set forth the Unions' understanding that Tyson and Holly Farms were now the same Company for all purposes and that the Unions would treat them as such.

The first response to Blevins' above letter came from Howard D. Baird, Tyson vice president, industrial relations, in correspondence dated September 26. Baird defended the Respondents' requirement that the Holly Farms drivers sign a statement that they wished to be employed by Tyson Transportation as that Company's means of determining who was interested so as to enable a decision whether it would be necessary to hire additional drivers. Baird concluded his letter with the following paragraph:

> With regards to your demands to meet with you to negotiate an agreement for these drivers, we must refuse in as much as they will be part of the considerable larger unit with entirely different scheduling, terminal locations, hauling distances, and management. As such, it is our feeling that a bargaining obligation does not exist. We must also refuse to meet and bargain with you over the decision in as much as it is entirely within

[163] Holly Farms drivers had been averaging 3 to 4 days on round trip.

[164] The parties stipulated that Grider, while not a supervisor, had acted as a Respondents' agent within the meaning of Sec. 2(13) of the Act in making the September 22 telephone call to Royal.

[165] Seven or eight of the 47 drivers who declined work at the specified terms, including Hester, Branscome, and T. R. Hayes, had retrieved the initial acceptances from David Hayes and John Sloop, having explained that they did not want to be away from home as long and wanted to be able to shower in a motel. They were concerned that Tyson did not reimburse its drivers for motel rooms.

[166] Since the Tyson Foods/Holly Farms merger agreement was the subject of the only refusal to bargain allegation based on failure to furnish requested information, it is not relevant to refer to the other items sought.

> our prerogative and due to changing conditions and economic needs. With regards to the effect of that decision, you are advised by the Holly Farms negotiating representative that they are prepared to negotiate on such effects which, as I witnessed, you refused.

Blevins, by September 29 correspondence to Hogg, reiterated the Unions' September 12 position that the Respondents were obliged to bargain with the Unions over any decision to move Holly Farms drivers into Tyson Transportation, as well as the effects of such decision or transfer. He repeated the Unions' request that Holly Farms, Tyson and/or both meet with the Unions to negotiate a collective-bargaining agreement covering the employees represented by the Unions and that the current terms and conditions of employment be continued until a contract has been signed. Finally, the Unions restated their request for the information, including the merger agreement, sought in Blevins' September 15 letter.

In correspondence, dated October 10, Hogg replied to Blevins' September 29 letter point by point. Hogg noted, contrary to the Unions, that Holly Farms was the only Company that recognized Blevins' Unions; that Hogg had represented only Holly Farms, not Tyson, in bargaining with the Unions concerning the drivers and yardmen; that nobody but Holly Farms was obliged to bargain with the Unions concerning the employees in question; and that the Tyson management personnel who had attended bargaining sessions had been there out of courtesy and to provide any needed information to Holly Farms negotiators.

In his October 10 letter, Hogg disagreed with Blevins that Tyson did not have a right to integrate the transportation operations without bargaining with the Unions over the decision to integrate as well as over the effects of that decision on the unit employees. He noted that Holly Farms, in fact, had offered to bargain with the Unions concerning the effects of impact of that decision. Hogg rejected the Unions' request to continue the Holly Farms' transportation employees under the terms and conditions of employment that had existed as of September 12 on the ground that, if Holly Farms were to recognize an obligation to continue that status quo, such recognition, in effect, would deny Tyson's right to integrate the operations.

Hogg noted that the Unions, on September 12 and since, had not asked Holly Farms to continue contract negotiations, as distinguished from impact negotiations, and that if the Unions had requested continuing contract negotiations with Holly Farms until the integration was implemented, Hogg would have agreed. Hogg concluded his letter with the following offer to the Unions:

> 1. Holly Farms will meet with [the Unions] and negotiate in good faith with regard to the wages, hours and working conditions of the employees in the [drivers-yardmen] unit described in NLRB Case No. 11–RC–5571, until such time as it is abundantly clear that the Holly Farms transportation operation has been fully integrated into the Tyson Foods transportation operation.
>
> 2. These negotiations will include impact or effects negotiations at your pleasure.
>
> 3. These negotiations are to take place on a clear understanding that Holly Farms is dealing with you and Tyson Foods is not.
>
> 4. No contention is to be made later on that either Holly Farms or Tyson Foods has waived the right to refuse to negotiate based on their position that a legally adequate integration has already taken place. Otherwise stated, Holly Farms' participation in negotiations is not to be argued as showing that either Holly Farms or Tyson Foods admits that the 11–RC–5571 unit remains intact at this time.

In Hogg's October 10 response to Union Attorney J. David James' September 28 letter, he distinguished certain cases that James had cited in support of why the Respondents should furnish the requested merger agreement. Hogg did this, in part, by pointing out that in one of the cited cases, the employer representative's explanation of the terms of the thern requested agreement, had been found unreliable and, therefore, unlawful, because of that representative's lack of personal knowledge of the content. Hogg, however, noted that that was hardly true in his case. While continuing to deny any obligation to furnish merger agreement data, Hogg ended his letter by quoting the following provision from the merger agreement:

> *Article V. Certain Covenants*
>
> *Section 5.8. Employee Plans*. The parent agrees [that] following the Effective Time the Surviving Corporation will provide, for a period of two years after the Effective Time, employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employees benefits following the Effective Time which are no less favorable in the aggregate than the employees benefits provided under the plans and arrangements for such employees by the Company as of the date hereof.

James' October 17 reply to Hogg noted his disagreement as to what the law required in the way of information from the Respondents. He noted the Unions stood by their earlier request for all the information including, but not limited to, a complete copy of the merger agreement and that the Unions were supported in this by the complaint that had been issued by the Board's Regional Office. The Unions, to facilitate this process, stated their willingness to enter into a confidentiality agreement with the Company.

Also on October 17, James sent a second letter to Hogg pursuant to Blevins' request that James answer Hogg's October 10 letter to him. In this letter, the Unions expressed their disagreement with Hogg's characterization that they did not wish to engage in impact bargaining. The Unions reiterated their readiness to bargain with Tyson and Holly Farms on all issues, including the decision to transfer the drivers to Tyson and the impact of that decision, but reaffirmed their need for the requested information to enable the Unions to bargain effectively. James questioned the seriousness of Hogg's previous offer to negotiate for a collective-bargaining agreement only until such time as integration was implemented, asking who would determine when Holly Farms Transportation had been so fully integrated into Tyson Transportation as to end

contract negotiations. James also challenged certain company positions, including Hogg's representation that Holly Farms would negotiate only if it was clearly understood that Holly Farms, alone, was dealing with the Unions and that Tyson was not. He asserted that both Tyson and Holly Farms were obliged to bargain.

In his October 23 reply to both of James' October 17 letters, Hogg reiterated the Respondents' basic positions. Responding to the statement in James' letter that the Unions did not wish to engage in impact bargaining until it received the remaining requested information, Hogg pointed out that the information sought related to details of the process that had resulted in the decision to integrate. As Hogg did not believe that the decision to integrate was bargainable, he did not believe that the Unions were entitled to information as to how that decision had been made. Hogg, therefore, would not advise that the requested information be provided.

Hogg, also agreeing that it would be ''a little silly for the Unions to continue contract bargaining during the time when the integration process was taking place,'' set forth in his view that the integration process already had been completed. Hogg again asserted corporate duality, declaring that Holly Farms insisted that Tyson, not itself, had the right to integrate these transportation operations and, therefore, had the right to employ the Holly Farms drivers under Tyson's wages, hours, and employment conditions. The issue of whether the unit employees could be integrated into Tyson was not bargainable. Hogg concluded by reiterating that he bad not represented Tyson in bargaining with the Unions because Tyson did not have any bargaining relationship or obligation with the Unions. Hogg noted that it did not make any difference whether James agreed with the Respondents' position on that point as far as Holly Farms' willingness to bargain is concerned.

k. *Comparison of Holly Farms and Tyson pay and benefits plans*

Under the Tyson pay plan, long-distance drivers earned less for comparable effort than under Holly Farms. While, under the Holly Farms pay plan, announced December 16, 1988, all its eastern division drivers were be paid at a basic rate of 28.25 cents per single mile driven, at Tyson, the mileage rate for drivers with 0 to 3 years seniority gradually increased on a scale ranging from 20.5 to 25.5 cents per mile. While Holly Farms allowed $6.95/hour breakdown pay, to be paid beginning 2 hours after the driver called in his breakdown report and continuing until he again began to move or for a maximum of 8 hours, the Tyson plan did not include such an allowance. Layover pay at a rate of $45 was made available by Holly Farms for delays at customers' premises starting at the 17th hour past a driver's scheduled delivery time, while Tyson provided layover pay of $50/day when unloaded and available for dispatch by noon local times. While Holly Farms allowed $8/stop and $12/pickup pay, Tyson afforded $5 for pickups/drops; no drop pay for straight loads; and a multipickup/drop arrangement payable at $10 for the first two stops and $15 thereafter. No stop pay, as such, was mentioned in the Tyson plan.[167]

Holly Farms also provided its employees with a benefits schedule which included, as noted, eight paid annual holidays at $55/day; paid funeral leave and jury duty;[168] paid vacations ranging in length from 1 week after 1 year of service, increasing to a maximum of 4 weeks after 15 years with the Company; paid group insurance, including life, accidental death, and dismemberment, weekly disability benefits, hospital and surgical expense, major medical, dental and vision care assistance plans,[169] and a retirement plan.

Except that Tyson afforded its driver seven annual paid holidays at $45/day, with no reference to paid jury or funeral leave, fringe benefits available to Tyson drivers are not clearly defined in the record. However, the record does establish that one of the terms of the merger agreement, which was included at the insistence of Holly Farms' board chairman, was that Holly Farms job benefits should continue intact for former Holly Farms eastern division employees in Tyson's service for 2 years after the merger.

Although the drivers' mileage compensation rate, schedule of other payments, such as stop and pickup pay, and job benefits were superior under Holly Farm than under Tyson, the Respondents, nonetheless, argue that the former Holly Farms drivers actually earned more money annually while working for Tyson because Tyson Transportation, more than had Holly Farms, required that each driver spend longer periods on the road accumulating compensable mileage. Holly Farms' drivers had averaged 3 to 4 days away from home on each round trip, driving a weekly average of 1800–2000 miles, generally making deliveries at a given location and then returning, preferably with a backhaul load. This was because the Holly Farms transportation division was operated as a delivery arm of that Company's poultry business. Tyson Transportation, on the other hand, considered itself an independent company profit center in the freight business and, accordingly, actively pursued hauling opportunities wherever available. So, while a Tyson driver, like a Holly Farms driver, initially would depart to deliver his Company's product to one or more customers, the Tyson driver, after completing those deliveries, but before returning, would be further dispatched to pick up and deliver various other types of freight, running as many as six ''legs'' to the overall journey and averaging approximately 2500 miles/week. Tyson drivers averaged 10–14 days on the road per trip.

l. *Arguments concerning the refusals to bargain*

The General Counsel and Union contend that Tyson, as Holly Farms' successor, was obliged to recognize and bargain with the Unions with respect to the employees in the certified drivers-yardmen unit; that the Respondents failed to meet this duty by unilaterally announcing the above changes on August 8 concerning integration of the western division drivers into Tyson Transportation and the unilateral reductions in the eastern division by the layoff of 71 drivers and

[167] The smaller number of Texas-based drivers in the Holly Farms western division received a lesser rate of 25 cents/mile with the other employment terms the same. However, unlike Tyson drivers, who started at 20.5 cents/mile and worked up to 25.5 cents/mile only after 3 years' service, the Holly Farms western division drivers received the 25-cent/mile rate from the start of their employment.

[168] Jury duty was compensated as the difference between $55/day and what the employee received for serving on the jury.

[169] After 3 months on the job, Holly Farms employees had the option of purchasing the same insurance for their dependents as the Company provided to them.

removal of 47 tractors;[170] by the September 12 announcement that the entire Holly Farms transportation division would be merged into Tyson Transportation under unilaterally changed employment terms for affected employees; by refusing to bargain about the decisions to make these changes in the unit during the certification year; by unilaterally withdrawing recognition from the Unions as bargaining representative; and by refusing to furnish the Unions with a copy of their merger agreement setting forth the Respondents' understanding as to job benefits for unit employees. These parties also assert that the Respondents had violated Section 8(a)(5), (3), and (1) of the Act by constructively discharging the above-named 47 employees for having declined to work under the unilaterally changed terms and conditions of employment; by unilaterally announcing the end of the Holly Farms retirement program; and by the actual merger of unit employees into Tyson Transportation that followed, with changed employment terms.

The Respondents, whose bargaining positions in good measure were set forth in the foregoing exchanges of correspondence, in part, argue that elements of the asserted constructive discharges were not met since the Respondents had not intentionally sought to force its employees' resignations because of their union activities by making conditions so difficult as to render continued employment intolerable. In this regard, the Respondents contend that the proffered employment conditions, the same as already applied to Tyson's 550 drivers, represented the going industry pay rates and were not discriminatory punitive or unpleasant as indicated by the fact that the overwhelming majority of the drivers who had received the September 12 letter had elected to accept and to maintain their employment relationship with Tyson. The Respondents further argue that even if the employment terms offered by Tyson had been less desirable, there is no evidence that the 47 disaffected employees would have been influenced by this in their decisions, as there was no separate showing that these employees had studied the Tyson pay or had had it explained to them by the Unions.

The Respondents further contend that only Holly Farms, not Tyson, had a duty to bargain with the Unions, while Tyson had a right to make the changes announced and invoked.

Immediately after the September 12 negotiating session, the Respondents began a comprehensive program to quickly and completely integrate Holly Farms into Tyson. In this process, both Holly Farms' transportation and production facilities were absorbed.

m. *The integration of Holly Farms transportation division into the Tyson transportation system*

After the September 12 meeting with the Unions, Tyson officials Irwin and McNeese returned to that Company's Springdale, Arkansas, headquarters and immediately drafted a rough outline of a plan to integrate the two companies in applicable time frames. They believed that Holly Farms' smaller western (Texas) division could be completely integrated by October 2, with implementation by that date of Tyson's fleet manager's dispatching concept and the start of work on a new Texas terminal away from the former Holly Farms Seguin and Center plants and the Tyson Carthage plant, which could service all three production facilities.

In reviewing Holly Farms' eastern division, Irwin and McNeese discussed establishing a terminal at Statesville, North Carolina, centrally located between Wilkesboro and Monroe, since a facility, so located, could handle tractors from Temperanceville and Richmond (Glen Allen).

In implementing these plans, a Carthage, Texas terminal was opened in an existing building on October 16 under the Tyson system with a Tyson operations manager and a fleet manager who had been with Holly Farms. As no suitable facility was available in Statesville, a new terminal, instead, was opened in Wilkesboro, near the airport, 1–2 miles out of town in a building that had been owned by Holly Farms.

Before the merger, Holly Farms which principally was a producer of fresh poultry and related products, observed a product ratio of about 60-percent fresh to 40-percent frozen. Tyson, predominantly a frozen poultry producer, had a reverse product ratio. As of September 12, Holly Farms owned approximately 170 tractors, of which around 120 were used for long hauls and were for local use. Around 220 drivers, including extra board,[171] were assigned to these vehicles.

As of September 12, Tyson owned and operated 400 to 450 tractors, including 400 long haul and 40 to 50 shuttle local tractors. Including extra board and tea operations,[172] approximately 550 drivers were used to operate those vehicles.

As noted, before the merger, Holly Farms and Tyson Foods had different role views of their respective transportation departments. Tyson saw its transportation system as a profit center within the corporation, while Holly Farms transportation was an adjunct to its production operations. Accordingly, while the Tyson transportation group considered itself in the freight business, picking up and carrying cargo of various kinds to locations far removed from its trucks' points of origin, as opportunity allowed, the Holly Farms group was more influenced by plant management and existed principally to move that Company's products from its production facilities to customers.

While the drivers in the Holly Farms' eastern division transportation group ultimately reported to David Hayes as vice president for transportation, the drivers in that Company's western division reported to a division vice president for production in Center, Texas, and were controlled, not by the transportation group but by the production group. Both Hayes and the western division vice president reported to Blake Lovette, Holly Farms' president. However, even though the eastern division drivers reported to the transportation group, they still were subject to appreciable influence by company production officials, and plant and growout managers could decide how many tractors could be domiciled at their plant facilities.

[170] While, as noted, these initially announced changes affecting the eastern division were later rescinded in favor of other unilaterally imposed changes, this was not done until after the drivers to be excessed had been notified for some time.

[171] Extra board drivers did not have regular tractors assignments and filled in for absent full-time drivers.

[172] Team operations, differently applied by Holly Farms and Tyson, will be discussed below.

(1) Changes in the dispatching system

Under the Holly Farms system, dispatchers were based at each of the company plants. Head dispatcher, Curtis (Bob) Absher, was based at that Company's Wilkesboro headquarters complex and lead and regular dispatchers were located at outlying plants. Long-distance drivers were hired at the respective plants. All orders for products were taken at Wilkesboro and were then forwarded to the relevant plants to be filled. The dispatchers based at those plants would assign loads to company-owned trucks, often on a first-in, first-out basis. At Wilkesboro, the then outhaul manager, Barry Wood, as deemed necessary, would book the outside carriers. This would be done at outlying facilities by the lead dispatchers. The Wilkesboro and Center locations had groups that would solicit return trip backhaul cargos destined for the immediate areas of Holly Farms' plants.

In absorbing the Holly Farms trucking operation, Tyson basically extended its own system. In the postintegration period, after September 22, the dispatchers were removed from the plants and, in their place, fleet managers with authority to assign drivers, ultimately were situated at Tyson's four terminals, at Springdale and Russellville, Arkansas; Wilkesboro, North Carolina; Oxford, Alabama; and Carthage, Texas.[173] All sales orders were received at the Springdale central sales office which determined which facility would fill a given order. The director of traffic's group[174] in Springdale, which first received the order from the sales department, would determine which load was to be delivered from which terminal, based principally on geographic location with respect to the plant and the customer. The director of traffic then would send the order to the operations manager heading the selected terminal[175] who would allocate the trucks to service the total number of orders. The operations manager then would convey the sales order to a given fleet manager at the terminal who, in turn, would assign the load to the driver,[176] telling the driver where to pick up the loaded trailer and the destination. Where the terminal was not situated to handle an order, the fleet manager, through his operations manager, would so notify the Springdale operations manager who then would advice the director of traffic to book the services of an outside carrier,[177] which he did through subordinate outside truck coordinators. Terminal operations managers had authority to hire, discharge, and discipline. Fleet managers only could discipline.

Under Holly Farms, the same dispatchers at various plants, who dispatched the long-distance drivers, also dispatched the local drivers, who usually made deliveries within a 150-mile distance of where they were based. Under Tyson, local drivers, now designated shuttle drivers, all were dispatched by a Wilkesboro-based shuttle manager who was part of the transportation department. These local drivers will be separately considered below.

The parties are in accord that, following merger, there was substantial integration of loads and they stipulated that, during the week of October 2, former Tyson drivers and tractors handled 187 Holly Farms trailer loads and that former Holly Farms drivers and tractors handled 2 trailer loads of Tyson products.

The fleet manager system was introduced at Wilkesboro on September 23, following extensive training by Tyson representatives from Springdale, between September 12 and 22. From that introduction date, drivers were expected to call the Wilkesboro fleet managers for assignment. Between October 12–22, Holly Farms' lead dispatchers were offered positions with the Tyson Transportation management group. One of these, Roy Myers, a lead dispatcher at Temperanceville, accepted the shuttle manager's position in Wilkesboro. Two others rejected, respectively, the operations manager's job and a fleet manager's position at Wilkesboro. The two fleet manager jobs in Wilkesboro ultimately were taken by former Holly Farms dispatchers.

Supporting the fleet managers at Wilkesboro were clerical employees who had been on staff at Holly Farms as payroll clerks with experience in routing, payroll functions, and clerical skills. Redesignated as dispatch coordinators, they and the fleet managers began to access the Tyson computer system, which had been brought to Wilkesboro. Basically, two dispatch coordinators working with each fleet manager spoke daily to each driver, providing routing and fuel price information, assisting with logs and making computer entries of all data concerning the drivers' payroll and cash advances.

Unlike the first-in/first-out assignment system used by Holly Farms under which the first driver to return to the terminal would be the first to be assigned the next load, Tyson's fleet managers attempted to equalize mileage among the 50–60 drivers assigned to them, thereby more evenly distributing the drivers' earnings. Accordingly, drivers who had just completed the longest runs would be offered the shortest runs. However, in making these assignments, Tyson tried to recognize driver preferences where all things were equal. Accordingly, some drivers liked to stay within a 500–800 mile radius of their terminals while others preferred 1500 to 1800 mile runs. Some leaned toward the multidrop less than trailer load (LTL) deliveries associated with frozen product runs.[178] If the available drivers were sufficient in number to make the necessary deliveries and if all had accumulated the hours,

[173] Including the production facilities obtained from Holly Farms, these 4 terminals served production plants or complexes in 33 municipalities scattered throughout Virginia, North Carolina, Georgia, Alabama, Arkansas, Missouri, and Texas.

[174] Bruce Clark, who before the merger was Tyson's director of outside transportation, became director of traffic.

[175] At the time of the hearing, the operations manager's position for North Carolina, in Wilkesboro, was unfilled and David Hayes who had become Tyson Transportation's eastern division director, filled both positions.

[176] The number of fleet managers at a Tyson terminal varied according to the size of the terminal. Filling roles comparable to Holly Farms dispatchers, they were responsible for the operation of groups of 50 to 60 tractors and the drivers to whom those vehicles were assigned.

[177] In this regard, the terminal operations manager was functionally comparable to Holly Farms' lead dispatchers, based away from Wilkesboro who, as noted, engaged outside carriers for their surplus loads. At Wilkesboro, that service had been rendered by the then outhaul manager, Barry Wood.

[178] Since frozen product was more expensive than fresh, customers were less likely to order a full trailer load of the frozen and so LTL loads often had product for several destinations before the trailer was emptied, necessitating more time on the road. Tyson's outbound LTL freight, at 40 to 50 percent of total deliveries, contrasted with Holly Farms' 15 to 20 percent.

fleet managers tried to observe the drivers' preferences in making assignments.

Holly Farms had utilized separate dispatchers at each plant for outhaul and backhaul. Accordingly, if a Holly Farms driver was preparing to make an outbound product delivery, he would get his assignment from the outhaul dispatcher at his plant location. If such a driver was picking up a backhaul load, he would call a different dispatcher depending on his geographical location at the time and he also would call a different dispatcher in the backhaul group. Holly Farm did ask the drivers on outhaul deliveries to call the central Wilkesboro office and some would. However, drivers who were not domiciled at Wilkesboro would call their home location.

Under Tyson Foods, the driver called one fleet manager who gave highway his assignment whether outhaul or backhaul in whatever part of the country he might be.

(2) Backhauling

Holly Farms had operated a centralized backhaul department which solicited and booked freight for return runs. Summaries of that Company's records show, however, that during the fiscal years ending May 31, 1987, and 1988, respectively, roughly 41 or 42 percent of Holly Farms return runs came back empty (deadheaded) and did not result in revenues. David Hayes explained that this high deadheading rate had been due to Holly Farm's primary use of its own equipment to haul its own product to market and that the backhaul program had not been effective because of that Company's reluctance to leave its outbound traffic lanes to obtain backhaul freight.

However, under Tyson, outbound trucks, after completing deliveries, were directed to go wherever necessary to obtain additional freight without regard to the nature of the freight or as to where it went as long as additional revenues resulted. Accordingly, while long haul drivers for Holly Farms might be gone an average of 4 days per trip, Tyson drivers who might be additionally routed several times, could be on the road for an average of 10–14 days. Tyson drivers also could expect to be sent out again 2 days after they had returned.[179]

Before the merger, as noted, Holly Farms drivers had averaged 1800–2000 miles/week, but at the time of the hearing, with additional backhauls, they were driving 2350 to 2500 miles/week. This brought them up to within 100 to 200 miles/week of what the former Tyson drivers were averaging, and it was anticipated that with additional experience with the Tyson system by fleet managers and drivers alike, that that gap would be closed.

Tyson's backhaul operations were centralized in Springdale in a group under the solicitor who, in turn, reported to the sales manager. This group, by telephone, constantly solicited backhaul loads across the country to find freight sufficient to refill trucks that were emptying in broad, divers regions. Fleet managers advised these solicitors where their trucks were emptying and the solicitor's group would attempt to obtain loads to match the available trucks. When such a match of load to truck was made, the fleet managers would not have discretion to further assign specific trucks to handle specific loads unless, at a given location, the same numbers of trucks and loads were available.

(3) Yard personnel

Under Holly Farms, yardmen were transportation department employees who reported to the dispatchers. Yardmen dropped incoming trailers at specified places, cleaned the trailers' interiors; and, after unhooking the trailers, parked the tractors at specified places. When outbound trailers were loaded, yardmen hooked the trailers to the tractors and drove the tractors across the Company's scales. They also fueled tractors, installed load locks, loaded stabilizer bars to stabilize loads, and closed and sealed trailer doors. Their duties included checking the slack adjusters on the brakes beneath trailer, checking the equipment, and replacing light bulbs as necessary.

Under the Tyson system, yardmen were assigned to the plants rather than to the transportation department, and had fewer duties. Under Tyson, drivers, not yardmen, were responsible for hooking trailers to tractors and for weighing and fueling their tractors. When drivers return, they, rather than the yardmen, were required to unhook the tractors from the trailers, to fuel, and to park the tractors.

Tyson had transferred the yardmen to individual plant locations by around November 1. At the plants, their duties were to move and to empty trailers; to partially or fully load them in and out of plant loading facilities. Yardmen continued to wash the trailers, inside and out. They precooled trailers before loading: insured that enough pallets were available at the loading dock; partially or fully loaded trailers, moving them in and out of the plant loading facilities: secured the load inside the trailers, put in load locks, and sealed the trailers. They moved trailers to the pickup areas so that the drivers could hook the trailers onto their tractors and depart.

Under Tyson, the yard personnel reported to the transportation coordinators, all of whom were former dispatchers transferred to plant payrolls. These transportation coordinators merely expedited loads and ensured that the paperwork was done. While as dispatchers under Holly Farms, they had supervised groups of drivers domiciled at their plants, they no longer participated in load selection, assignments of loads to drivers or other driver supervision. Transportation coordinators were so named because they were responsible for coordinating production with transportation functions.

Tyson continued to employ the same number of yardmen at Wilkesboro as had Holly Farms.

(4) Shuttle (local) drivers

Under Holly Farms, local drivers were a part of the transportation division. Eleven Holly Farms trucks were based in Wilkesboro and six trucks in Monroe were used to make deliveries of 100 to 150 miles radius to customers in North Carolina. If all local delivery trucks were being used, additional local deliveries would be made by long-distance trucks.

[179] For use in backhauls, Tyson had a 48-states general commodities operating authority from the Interstate Commerce Commission (ICC), granting both general commodity and contract operating authority. This allowed Tyson to haul anything between States in the continental United States except household goods and explosives. Since the merger, Holly Farms' ICC motor carrier number was discontinued, all operating authority was combined and all trucks operated under Tyson's authority.

Under Tyson Foods, the local drivers were redesignated shuttle drivers and the number of shuttle deliveries dramatically increased. This was because Tyson products were sent to a cold storage facility in Charlotte, North Carolina, from where they were shipped to customers.[180]

Tyson added more local drivers and extended the local delivery distance to about 250 miles one way. At the time of the hearing, Tyson had a total of 31 shuttle drivers. Of these, 4, for the first time, were based in Richmond; 2 in Temperanceville, 9 in Monroe; and 16 in Wilkesboro. Shuttle drivers were part of Tyson Transportation, and all were centrally dispatched from the shuttle department at the Wilkesboro terminal.

Establishment of the shuttle department with drivers at all applicable locations was completed at the end of November.

(5) Plant and truckload integration

The parties stipulated to integration of plant product and of deliveries from an early date. Accordingly, the parties agree that during the week of September 25, Tyson and Holly Farms began to load their respective trailers with each other's loads. Tyson's plant at Shelbyville, Tennessee, which previously produced frozen poultry was turned over to the Holly Farms fresh division, but continued also to produce Tyson brand products. Since September, former Holly Farms plants now producing Tyson label products included those at Monroe, Richmond, Wilkesboro, and Center. These also continued to produce Holly Farms products. The Holly Farms Food Service operation in Wilkesboro, since the merger, produced more Tyson label products, using different formulations than before.

During the week of September 25, total loads of Tyson and Holly Farms products, excluding transfers, moving on company-owned trucks were 1276 of a total of 2527. Tyson trucks hauled 107 Holly Farms loads and Holly Farms trucks handled 35 Tyson loads. This mix thereafter increased and the Tyson freight rating system was put into effect.

(6) Quality control and sales

The Tyson quality control system was put into effect at the Holly Farms roast chicken plant in Wilkesboro, where whole chickens and parts were fully cooked and prepackaged for sale.

The quality control system changed in that, where quality control managers, under Holly Farms, would answer to Blake Lovette, under Tyson, they were responsible to a quality control vice president in Springdale.

The sales departments also were correspondingly integrated.

(7) Work rules

Prior to the merger, Holly Farms had published its own work rules. David Hayes testified that, since the takeover, Tyson also had published work rules affecting Holly Farms employees, implemented around October 1. These new work rules were distributed to the 24 new employees hired since the takeover. Hayes, however, was uncertain as to whether the new rules also were given to existing employees. He did not believe that Holly Farms employees at the time of the takeover were informed of the new work rules.[181]

(8) Team assignments

To comply with the Interstate Commerce Commission restriction that no driver may drive for more than 10 consecutive hours, Holly Farms, when time restraints on a delivery required more than 10 hours of straight driving, would assign a team made up of a regular and an extra board driver to limit the amount of uninterrupted driving either would have to do. Such team assignments were not permanent, but were made for one trip. The Holly Farms system of using two drivers on an outhaul for trips that were longer than one driver could take under regulations, diminished driver earnings because mileage, the principal component of driver pay, was paid at a lower rate for team assignments. Accordingly, the more team operations a driver ran, the less his earnings.

Tyson, to comply with this regulation, used permanent teams, usually consisting of a married couple. Tyson did not follow Holly Farms' practice of matching up temporary teams of regular and extra board drivers and, where a load was going to take more than 10 hours to deliver and time was critical, Wilkesboro would call Springdale and ask for a permanent team. If such a team was not available, Wilkesboro would inform the sales department that such a team was not available and ask that they inform the customers that the product would be delivered late. To avoid such late deliveries, Tyson, where possible, would seek more lead time.

(9) Uniforms and company logos

Holly Farms did not require that its management representatives and drivers wear uniforms, but, uniforms were mandated for Tyson managerial personnel and encouraged for drivers. Management representatives wore khaki shirts and trousers. The Company furnished these shirts with the Tyson logo over the right breast pocket, and the executives' first names were stitched over the left breast pocket.

Tyson drivers, too, including those from Holly Farms, were furnished khaki shirts with the Tyson logo. Their own first names did not appear on the shirts. The individual provided his own trousers. For drivers, the Company also provided a coat and, occasionally, other overwraps such as jackets. Driver use of uniforms was not mandatory because of laundering problems while on the road.

With respect to equipment, Irwin testified that there would be no change in the earlier system where Holly Farm had had its own tractor colors and logo. However, it was decided that new equipment all would be purchased with the Tyson colors and logo on tractors and trailers but that the Respondents would not go through the expense of repainting all existing equipment. In this regard, the Respondents, at the time of the hearing, were in the process of replacing the 45-foot trailers in the fleet with larger units to provide greater cubic capacity.[182]

[180] Under Holly Farms, permanent cold storage facilities were not available, but such facilities occasionally were used for overflow when sales were poor and it was necessary to freeze product.

[181] While the Tyson work rules may not have been distributed, they were applied. In February 1990, two drivers were terminated for refusing a dispatch.

[182] Holly Farms has not done its own vehicle purchasing for long haul transportation since September.

(10) Control of labor relations

Under Tyson Foods, the Tyson/Holly Farms direction of labor relations has been centralized in Springdale under Irwin, Baird, and McNeese.

(11) Safety

Before Tyson, Holly Farms' safety program was administered through the Wilkesboro corporate safety and security office. Under Tyson, the safety program was administered from Springdale by a manager of safety and personnel who reported to McNeese, the transportation director. The Holly Farms corporate safety program was discontinued. Since his September 25 appointment as manager of safety and personnel at Wilkesboro, John Sloop was responsible for local safety activities. Cross-training was provided and Springdale safety personnel visited Wilkesboro to inspect all relevant areas and to ensure that drivers' files, including logs, were completed and in proper order, as required by law.

(12) Tyson Transportation department since July 18

Although Tyson was in control at Holly Farms from July 18, that Company made few, if any noticeable changes in Holly Farms' operations until after September 22. In that initial period, virtually all of Holly Farms' managerial, supervisory, and employee personnel were retained in essentially their former positions, although managers were absorbed into the Tyson organization with Tyson job titles. Employees continued to work under the same terms and conditions of employment, producing, and hauling the same product to the same customers as though the takeover had not occurred. It was only after the September 12 negotiating session that steps were taken to bring about the above-described changes. Although, as noted, the Respondents, during the August 8–10 negotiating sessions, had notified the Unions that the two Texas locations, comprising the Holly Farms western transportation division, would be merged into Tyson Transportation, much did not occur in that regard affecting western drivers until October.

On October 16, a new Tyson terminal was opened at Carthage, Texas, the terminals near the plants at Seguin and Center were closed, and the 18 drivers at those terminals and their equipment were relocated to Carthage. About 10 trucks beyond those that had been moved from Center and Seguin also were transferred to the Carthage terminal. While the Center and Seguin plants continued to be those nearest to the new Carthage terminal, that facility was the terminal geographically closest to Tyson plants in Waldron, Grannis, and Nashville, Arkansas; Broken Bow, Oklahoma; and Dallas, Texas, none of which have attached terminals.

At the eastern division, after some initial transitional shuffling of transportation department personnel in buildings within the Wilkesboro complex, a new terminal opened during the first half of December in what had been a Holly Farms building located near the Wilkesboro airport, approximately 2 to 3 miles from the Wilkesboro complex. The new Wilkesboro terminal served the former Holly Farms plants at Glen Allen (Richmond), Temperanceville and Harrisonburg,[183] Virginia; and Monroe and Wilkesboro, North Carolina, which plants no longer had attached terminals. However, the former Holly Farms drivers who had been domiciled near those plants when they did have terminals were not required to move although they, thereafter were dispatched from Wilkesboro. In this regard, Tyson excepted its former Holly Farms drivers from its rule requiring that drivers live within a 50-mile radius of their terminals.

Although Irwin testified to a company intent that all future drivers be hired from and live near the Wilkesboro terminal, the records shows that of the 23 drivers hired at Wilkesboro since September 22, 3 were permitted to live near Monroe and in the vicinity of Glen Allen. The rest of the new hires were domiciled in the Wilkesboro areas.

The record indicates, at least with respect to the eastern division, that while, since the autumn of 1989 all drivers have been dispatched by fleet managers at Wilkesboro, rather than, as before, by plant-based dispatchers, Tyson's Transportation, eastern division, essentially was under the same supervision as had been the Holly Farms eastern transportation division. David Hayes who, as Holly Farms transportation vice president, had overseen the eastern division, remained in place in essentially the same role as manager of the eastern division of Tyson Transportation, except that he reported to Springdale. Curtis (Bob) Absher, formerly Holly Farms head dispatcher at Wilkesboro, under Tyson, became manager of outside transportation, booking independent carriers as needed and replacing the outhaul manager, Barry Wood, who previously had performed that function at Wilkesboro for Holly Farms. Roy Myers, the shuttle manager under Tyson, had been brought to Wilkesboro from a lead dispatcher's position in Temperanceville, another Holly Farms east location. The fleet managers and dispatch coordinators with whom the drivers continued to work, formerly also had been part of the Holly Farms eastern division transportation dispatch system, and the new Wilkesboro terminal primarily serviced the Wilkesboro, Monroe, Harrisonburg, Temperanceville, and Glen Allen plants, locations that had comprised the Holly Farms eastern division transportation system. From the time Tyson took control on July 18, the clear majority of the Tyson's Wilkesboro and Carthage-dispatched drivers had been Holly Farms drivers who continued to drive their assigned tractors to perform the same functions and to exercise the same skills as under Holly Farms.

Until January 1, 1990, what had been the Holly Farms transportation department continued to operate under the Holly Farms Interstate Commerce Commission (ICC) operating authority because of the time period required to enable Tyson to reissue numbers for and to relicense the tractors. However, since that date, all operations have been conducted under Tyson's operating authority.

(13) Changes in the computer systems; methods of payment; and employee benefits

Before Tyson, Holly Farms, at Wilkesboro, used an IBM computer system, while Tyson operated with a Sperry

[183] As of September 12, the former Holly Farms fresh plant at Harrisonburg, which also had produced fast foods, such as Kentucky Fried Chicken and some IQF production, was assigned to the Tyson Foods Service Group, which sold further-processed, institutional-type poultry to hotels, restaurants, hospitals, and schools. As a result of this redesignation, the Harrisonburg plant's product was redistributed so that only 40 to 50 percent went to traditional Holly Farms customers, while the rest went to Tyson customers.

Univac system located at Springdale. On September 22, the information in the Holly Farms IBM computer concerning routing systems,[184] drops, deliveries, and other related areas, were entered onto the Tyson corporate Sperry Univac System, and the Sperry system, which was brought to Wilkesboro, was used to facilitate the central controls exercised by Tyson over the Wilkesboro operation.

However, for 2 years after the Tyson takeover, the Respondents continued to use the Holly Farms IBM system for paying the eastern division drivers and for other former Holly Farms eastern division employees. Payroll information for the former Holly Farms east drivers, entered into a Sperry terminal in Wilkesboro, was transferred to the mainframe computer in Springdale where the necessary deductions and net pay were computed. This information was transferred back to the Wilkesboro IBM system where the paychecks actually were cut, and the drivers paid by Holly Farms checks. This procedure, which applied only to the Wilkesboro and other eastern division locations, but not to the western division, was followed in accordance with the provision in the Tyson/Holly Farms merger agreement that Tyson continue Holly Farms job benefits for former Holly Farms employees for 2 years. This required continued use of the old Holly Farms computer system in order to facilitate maintenance of those separate benefits records. When the 2-year period of continued benefits expired, Tyson anticipated discontinuing those benefits and, thereafter, preparing payroll and paychecks for all on the Springdale Sperry Univac computer, from where the checks would be sent for local distribution. Tyson job benefits also would become applicable.

2. Refusals to bargain concerning the drivers-yardmen unit—discussions and conclusions

a. *Successorship*

The General Counsel and Unions argue that Tyson, as Holly Farms' successor, was required to bargain with the Unions as to the drivers-yardmen unit because Tyson, when it took control on July 18, had not exercised its right, existing at the time, to hire or retain Holly Farms' unit employees under new terms and conditions of employment. Instead, for about the first 2 months, Tyson had left those employees' employment terms essentially as under Holly Farms. Accordingly, with Tyson, Holly Farms' former employees had continued to work at the same locations, under the same pay scales and other terms and employment conditions, doing the same work using the same equipment, serving the same customers, reporting to the same supervisors, as before the takeover. The General Counsel and Unions argue that Tyson's bargaining obligation was triggered on July 18, when it began to operate the former Holly Farms business with an unchanged employee complement and, therefore, employed a substantial and representative complement of former Holly farms employees. The General Counsel and Unions further assert that, in spite of the changes that have taken place since September 22 with respect to Tyson's efforts to integrate the transportation and other operations of the two Companies, the drivers-yardmen who had comprised the Holly Farms transportation bargaining unit remained identifiable, although relocated, and had not been accredited into the larger Tyson Transportation system.

The Respondents, in turn, assert that Tyson's above-described operational changes had resulted in such complete integration of Holly Farms transportation into the such larger Tyson group as to have destroyed the drivers-yardmen unit and vitiated the Unions' status as majority bargaining representative even though the Unions were still in their certification year. In so contending, the Respondents emphasize the changes that have occurred and distinguish between Holly Farms' bargaining obligation to the Unions and that of Tyson. The Respondents' position, as noted, is that Holly Farms was obliged to bargain with the Unions only concerning the effects of those changes until such time as integration of the transportation employees' unit was completed, but that, since Tyson never had been bound to recognize and bargain with the Unions, that Company had had no responsibility to furnish the merger agreement or, otherwise, to bargain.

In *Nephi Rubber Products Corp.*,[185] the Board restated its criteria for determining the existence of a successor relationship as follows:

> (1) Whether there has been a substantial continuity of the same operations; (2) whether the new employee uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.

Also in *Nephi Rubber Products Corp.*, supra,[186] the Board noted that:

> In its review of the principles governing successorship in *Fall River Dyeing Corp. v. NLRB*,[7] the Supreme Court stated: ''In conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'''[8] The District of Columbia Circuit Court of Appeals likewise has explained:
>
> > In determining whether the requisite ''substantial continuity of the employing industry'' exists, courts and the Board typically look to a variety of factors. . . . However, we have also made clear that [t]he essential inquiry is whether *operations as they impinge on union members*, remain essentially the same after the transfer of ownership. [Citation omitted.] The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. As recently noted by the Ninth Circuit Court of Appeals, ''the touchstone remains whether there was an 'essential change in the business *that would have*

[184] Computerized routings replaced the route books previously prepared and issued to Holly Farms drivers by John Sloop.

[185] 303 NLRB 151, 152 fn. 6 (1991).

[186] Id. at 152.

> *affected employee attitudes toward representation*.'''[9]

The Board has articulated the same concept: ''In the successorship situation the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented.''[10]

[7] 482 U.S. 27 (1987).

[8] Id. at 43, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

[9] *Food & Commercial Workers Local 152 (Spencer Foods) v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985), quoting *NLRB v. Jeffries Lithograph Co*., 752 F.2d 459, 464 (9th Cir. 1985), quoting *Premium Foods v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983). The court's decision in *Spencer Foods*, which reversed the Board's dismissal of the 8(a)(5) allegation in that case, subsequently was endorsed by the Board. See *Sterling Processing Corp*., 291 NLRB [208, 210] fn. 9 (1988).

[10] *Derby Refining Co*., 292 NLRB [1015] (1989), enfd. sub nom. *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448 (10th Cir. 1990).

Here, noting the parties' above stipulation that, on or about July 18, Tyson had purchased a controlling interest in the stock of Holly Farms, making Holly Farms a wholly owned subsidiary, and that, since that date, Holly Farms, Inc., and Holly Farms Food Service, Inc.,[187] have been engaged in the same business operations at the same locations selling the same products to substantially the same customers, and having as a majority of their employees, employees who previously were employees of Holly Farms, in the context of the fact that for the first 2 months thereafter, nothing had changed for those who had been Holly Farms employees, I conclude that there had been no significant occurrence from the standpoint of unit employees affecting their desire for continued representation by the Unions. I, therefore, find that as of July 18, Tyson became Holly Farms' successor and, accordingly, became obligated to bargain with the Union, as of that date for the existing drivers-yardmen unit. In so finding, I note that while the above stipulation refers, by its terms, to the initial continued operation of Holly Farms' business by Holly Farms as an entity distinct from Tyson, that, in fact, was not the case. The record shows that, on Tyson's assumption of control, key Holly farms executives almost immediately were absorbed into the Tyson organization. Blake Lovette, Holly Farms' president, became, first, president, and then a Tyson senior vice president and general manager of Tyson Foods fresh retail division; Everett (Skipper) Solomon remained in charge of North Carolina operations, including the Wilkesboro complex, but now for Tyson; A. Gerald Lankford, Holly Farms vice president for human resources, became manager of human resources, Tyson Foods fresh retail division; and David Hayes, Holly Farms vice president, transportation, continued as manager of Tyson Transportation's eastern division. While, as noted, these executives remained in Wilkesboro, with essentially the same duties as before, they performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. When Blake Lovette, just before the August 8 and September 12 negotiating sessions, when major changes affecting the drivers-yardmen unit were announced to the Unions, instructed Attorney Hogg as to what to tell the Unions, he did so in consultation with other Tyson officials. Also, since all drivers-yardmen unit personnel were kept on the payroll under their existing wages, hours, and other terms and conditions of employment, I find that, as of July 18, Tyson/Holly Farms employed a substantial and representative complement of former Holly Farms employees.[188]

These findings are consistent with the following discussion of *NLRB v. Burns Security Services*,[189] in *Fall River Dyeing Corp. v. NLRB*:[190]

> although the successor has an obligation to bargain with the union, it ''*is ordinarily free to set initial terms on which it will hire the employees of a predecessor*.'' 406 U.S. at 294 . . . . We further explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring. . . . Thus, to a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained workforce of its predecessor. [Emphasis added.]

In summary, consistent with the above authority, I find that, since Tyson did not exercise its right to set initial terms and conditions of employment for retained Holly Farms employees different from those previously afforded by Holly Farms and, as these employees' employment terms and duties during the first 2 months after Tyson took control remained the same, they became established and not subject to unilateral changes I have found above that nothing occurred during this initial period under Tyson that could have so impinged on unit employees as to have affected their interest in continued representation by the Unions I, therefore, conclude that Tyson's obligation, as successor, to bargain with the Unions for the drivers-yardmen transportation unit was activated on July 18 when it acted to maintain the same business as Holly Farms and to retain in place a substantial and representative complement of that Company's employees.

b. *Accretion*

In reaching the aforesaid conclusions, I am not persuaded by the Respondents' argument that the integration of Holly Farms transportation into Tyson after September 22 resulted in the accretion of the existing drivers-yardmen unit into the Tyson Transportation system with a result that that unit no longer existed. Rather, in agreement with the General Counsel and Unions, I find that unit continued as separately identifiable.

As noted in *Reliable Trailer & Body*:[191]

[187] Holly Farms Foods, Inc. and Holly Farms Food Service, Inc., both are fully owned subsidiaries of Holly Farms Corporation which, as noted, is a wholly owned subsidiary of Tyson Foods, Inc.

[188] See *NLRB v. Jeffries Lithograph Co*., 752 F.2d 460, 464 (9th Cir. 1985), enfg. 265 NLRB 1499 (1982). Also see *Memphis Truck & Trailer*, 284 NLRB 900, 909 (1987).

[189] 406 U.S. 272 (1972).

[190] 482 U.S. 27 (1987), affg. 775 F.2d 425 (1st Cir. 1985).

[191] 295 NLRB 1013, 1018 (1989).

> The court, in *NLRB v. Security Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976), defined accretion:
>
> > an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity Thus, they are properly governed by the larger group's choice of bargaining representative.
>
> The court thereafter indicated the factors which should be considered when resolving accretion issues as:
>
> > integration of operations, centralization of managerial and administrative control and geographic proximity. Also relevant are similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history and interchangeability of employees. [Citations omitted.]

In concluding that the unionized eastern division transportation drivers currently dispatched from Wilkesboro and that division's yardmen, have not lost their separate identities, I note that those employees, under Tyson, continued to constitute a numerical majority of the employees performing those functions at Wilkesboro, Monroe, Temperanceville, Harrisonburg, and Glen Allen. Even though the terminals which, under Holly Farms, had corresponded to the aforesaid outlying plants, and at the Wilkesboro complex, were closed by Tyson after integration, those plants principally continued to be served on outhauls by drivers dispatched from the new Wilkesboro terminal. Mostly, these were the same drivers who previously had so served those facilities. These drivers, although currently assigned to longer runs, performed basically the same functions as under Holly Farms, using the same tractors and work skills to deliver, at least on outhauls, essentially the same products. Also, as noted, Tyson, had excepted its former Holly Farms eastern division drivers from its rule that drivers must live within a 50-mile radius of their terminals, and had permitted those drivers to reside away from Wilkesboro near the same outlying plants where they originally had been domiciled. Since the takeover, Tyson also has allowed four newly hired drivers to live near Monroe and Glen Allen, although requiring that most other new hires be domiciled in the Wilkesboro vicinity.

The former Holly Farms transportation eastern division also retained a separate structural identity within the Tyson organizational structure. David Hayes, who as Holly Farms vice president for transportation, had had responsibility for that Company's eastern division transportation group, continued at Wilkesboro as eastern division manager, Tyson Transportation, to fill the role of senior resident transportation official. Hayes exercised responsibility for much the same work, personnel, and area. Reporting to Hayes were two fleet managers, who filled the functions of the former dispatchers; a shuttle manager who, as noted, assigned local drivers, as had Holly Farms dispatchers; and a manager of outside transportation, which position was filled by a former Holly Farms head dispatcher, replacing the Holly Farms outhaul manager. The shuttle manager, too, had been brought in from a lead dispatcher's post in Temperanceville, a position and location within the former Holly Farms eastern division. Clerical support was continued by former Holly Farms transportation clerical employees, redesignated by Tyson as dispatch coordinators.

Shuttle drivers, classified by Holly Farms as local drivers, remained within Tyson Transportation, eastern division, and were dispatched from Wilkesboro by the shuttle manager. Where Holly Farms had employed 11 local drivers based at two locations, Tyson had 31 shuttle drivers distributed among four locations. Where Holly Farms had dispatched its local drivers on one-way distances of 100–150 miles, Tyson increased this distance to 250 miles.

Yardmen who, under Tyson, were moved from the transportation department to become plant employees at their former locations, also retained separate identity. They work under transportation coordinators, now also assigned to the plants who, as Holly Farms lead dispatchers, had supervised them before the takeover.[192]

Under Tyson, yard personnel no longer hook up or drop trailers to or from tractors, move tractors and trailers at specified places in the yard, or fuel tractors, which functions currently were performed by drivers. However, as described above, yardmen continued to perform all of their remaining traditional duties while continuing under the supervision of the redesignated former lead dispatchers. Although transferred to the plants, they were not absorbed into the production processes.

The foregoing factors demonstrate that the transfer of yardmen to the plant payrolls was indicative of administrative rather than of functional change.

A particularly significant manifestation of the separate identity of the eastern division transportation group was the arrangement carried forward pursuant to the Tyson/Holly Farms merger agreement of continuing to provide Holly Farms employee benefits to Tyson's former Holly Farms employees for a period of 2 years after the effective date of the merger. As a result of this arrangement, these employees received the superior Holly Farms job benefits for 2 years while their fellow workers at Tyson did not. As described above, the separate recordkeeping this process entailed required that Tyson compensate these former Holly Farms employees using Holly Farms paychecks cut in Wilkesboro on the old Holly Farms IBM computer instead of with Tyson checks prepared on Tyson's Sperry Univac computer in Springdale.

These considerations, in the context of the Unions' manifested interest in continuing to represent the former Holly Farms eastern division long haul and shuttle drivers and yardmen, warrant the conclusion here reached that the unit employees forming the former Holly Farms eastern division transportation group were not accredit to the Tyson transportation group, but have retained separate identity.

However, the western division drivers, after integration, were less separately identifiable than those in the east. The 25 western division drivers employed in early September at Seguin and Center, Texas, were moved to Tyson's new Carthage, Texas terminal on about October 16, when that terminal opened and 10 more tractors and accompanying personnel were added to the Carthage complement. In addition

[192] As noted, the role of Tyson's transportation coordinators was much reduced from when they were Holly Farms dispatchers, but they continued to supervise the yardmen.

to the Carthage facility's proximity to the Carthage, Seguin, and Center plants, it also appeared to be the terminal closest to the one other Texas plant; to three plants in Arkansas; and to one plant in Oklahoma. Since outhaul assignments were made from Springdale on a basis of geographic proximity, drivers from the Carthage terminal would primarily serve all of those plants in addition to the plants in Seguin and Center.[193]

As noted, under Holly Farms, there had been administrative differences between the eastern and western transportation divisions. The eastern division had reported to Holly Farms president through David Hayes as vice president for transportation, but the western division had so reported, not through Hayes, but through a division vice president with production responsibilities. The Texas drivers were carried on the payroll of Holly Farms of Texas, Inc., a separate subsidiary from Holly Farms Foods, Incorporated, which paid the eastern division. Also, Holly Farms eastern division drivers were paid a lower maximum mileage rate than in the east.

After September, unlike the eastern division, western division employees did not continue to receive Holly Farms employee benefits and to be paid with Holly Farms pay checks, cut on the old Holly Farms IBM computer. Instead, like other Tyson employees they were placed under the Tyson benefits program and were compensated by checks prepared on the Tyson Sperry Univac computer and distributed from Springdale.

Nevertheless, the 18 former Holly Farms drivers who were moved to Carthage from Seguin and Center, continued to constitute a clear majority of the relevant employees at that facility and continued to perform the same functions, exercising the same skills using the same equipment. While they, too, in servicing the additional plants in proximity to Carthage and in running extra ''legs'' to their trips, have spent more time on the road and away from home, they have remained a recognizable majority group relocated to and concentrated within the new Carthage, Texas terminal.

I, therefore, find that the drivers-yardmen unit, eastern and western divisions, did not become accredited into Tyson Transportation.

c. *The currently appropriate drivers-yardmen unit*

Having found that Tyson became Holly Farms' successor on July 18 and that the drivers-yardmen unit had retained separate identity and was not accredited into Tyson Transportation and, taking into account the extent to which the affected unit employees have been relocated and reassigned, I find the following redescribed unit to be appropriate:

> All driver employees employed by Tyson/Holly Farms who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Seguin and Center, Texas:[194] excluding all office clerical employees, guards and supervisors, as defined by the Act.

In accordance with the foregoing, I find that the Respondents, on and since August 8, violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions concerning their decision to fully integrate the Holly Farms transportation department, western division, into the Tyson Transportation system; that, from August 8 through September 12, these Respondents further violated those provisions of the Act by refusing to bargain concerning the unilateral decision to reduce the eastern division by laying off 71 employees and removing 47 tractors. The obligation to bargain concerning those announced reductions was not rendered moot by the Respondents' later unilateral September 12 recission of these reductions. The targeted eastern employees had been notified of their prospective layoffs and the recission was predicated on and followed by the Respondents' unilateral merger of both divisions into Tyson Transportation. The initially announced reductions in eastern division personnel and equipment were mandatory bargaining topics and the unilateral changes in wages, work locations, and other terms of employment caused by the merger, in themselves violative of Section 8(a)(5) and (1) of the Act, in turn, led to the constructive discharges of 47 employees.

d. *The 47 constructive discharges*

As found above, on September 12, following the negotiating session that day, Hayes, as Holly Farms vice president for transportation, on Holly Farms stationery, sent copies of the above letter to all Holly Farms transportation drivers advising that all such drivers were being offered employment with Tyson under the Tyson pay plan, but that, as provided in the merger agreement, Holly Farms benefits would continue to be provided for 2 years to Holly Farms drivers who accepted employment with Tyson. Interested employees were instructed to notify John Sloop by September 22.

The parties stipulated that, consistent with the testimony of long-distance drivers Eastridge, Kanupp, and Royal, the 47 above-named employees of the 209 drivers who had received Hayes' September 12 letter offering employment, rejected the terms set forth in that letter and did not come to work for Tyson. This was because they did not wish to accept the lesser pay and heavier work schedules then being offered by Tyson. The terms of the September 12 job offer were explained to recipient drivers by the Respondents' officials during a series of above-described meetings held with these drivers during September, answering the Respondents' argument that the drivers, absent adequate explanation by the Union, had not been sufficiently familiar with the proffered changed conditions to have meaningfully protested.

In *Mfg. Services*,[195] the Board reiterated the test for constructive discharge:

> First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult *or* unpleasant as to force him to re-

[193] While the Seguin and Center terminals were closed when the drivers were moved to Carthage, the plants at those locations remained open.

[194] The record does not describe what was done with the 10 western division yardmen after integration. This can be resolved in the compliance stage of this proceeding.

[195] 295 NLRB 254, 255 (1989).

> sign. Second, it must be shown that those burdens were imposed because of the employees' union activities. [Emphasis added.]

Applying this standard, the Board has found employees to have been constructively discharged in violation of the Act where, had they accepted the proffered employment, they would have been compelled to give up representation by their union;[196] where the employees would have had to endure a significantly adverse change in work scheduling, in compensation[197] and in job benefits.[198]

Had Eastridge, Kanupp, Royal, and the others among the 47 Holly Farms drivers accepted the September 12 job offer and remained under the available job terms, they would have been burdened by all of the foregoing as resultant from the unilaterally changed employment conditions. Any one of these changes, the Board has held, would have been sufficiently difficult or unpleasant to cause the constructive discharge of unaccepting employees. Instead of averaging 3–4 days away from home on each trip, while driving about 1800–2000 miles per week, as before, the drivers could expect to be away from home an average of 10-14 days/trip, while driving 2700–3000 miles/week. At the same time, eastern division drivers' mileage payments could be reduced by 2.75 cents/mile. They also would lose other above-described ancillary payments for drivers' services since Tyson had a lesser schedule of fees in connection with stops and deliveries.

The announced preservation of Holly Farms' superior job benefits package was to be temporary—to be discontinued in 2 years. These benefits, which included paid drivers motel rooms; eight paid annual holidays at $55 a day; paid jury duty and funeral leave; vacations; and medical insurance, were not matched by Tyson. Also, as the Respondents had unlawfully withdrawn recognition from the Unions, these employees would have been required to give up their right to representation by their bargaining agent of choice.

The Respondents' unlawful unilateral changes in working conditions and their refusal to continue to recognize and bargain with the Unions as their employees' certified bargaining representative converted the above-named employees' refusals to continue to work into constructive discharges in violation of Section 8(a)(5) and (1) of the Act.[199] The Board further has held that ''to condition employment on the abandonment by employees of rights guaranteed them by the Act is equivalent to discharging them outright for union activity.''[200] Accordingly, by constructively discharging the 47 above-named employees, the Respondents also violated Section 8(a)(3) and (1) of the Act.

In so concluding, I am not persuaded by the Respondents' arguments that constructive discharge should not be found here since the terms offered to the former Holly Farms drivers were not so difficult or unpleasant as to have forced their resignations, as evidenced by the fact that the great majority of drivers who received the offer accepted; and that the job terms were not discriminatory since they were generally the same as applied to Tyson's other transportation division drivers. As discussed by Administrative Law Judge Maloney in his Board-approved decision in *John Dory Boat Works*:[201]

> Where, as here, an event or requirement imposes on an employee an onerous or burdensome choice between remaining in employment or acceding to his employer's request and such event or requirement is generated by an employer's union animus, it does not matter how burdensome is the choice or how convenient are the alternatives. If the employee elects to leave under such circumstances, his termination is deemed a constructive discharge . . . it is not the aggravated nature of choice imposed discriminatorily on an employee that gives rise to a finding of constructive discharge, but the fact that any such choice was imposed at all for reasons proscribed by the Act.

Accordingly, in the context of the animus, found herein, the Respondents' unlawful conduct in making the unilateral job offers to Holly Farms drivers was not legitimized by the fact that; a majority of the unit drivers accepted the ''offer.'' It is not possible to determine how many of the unit drivers who agreed to remain on Tyson's new terms would have done so had they an economic choice. From a standpoint of determining whether discrimination had occurred, under *John Dory*, supra, it is not relevant, in the context of the Respondents' motivating animus, that the former Holly Farms drivers were retained under terms and conditions of employment that generally were similar to those of other Tyson drivers.

e. *Direct negotiations with unit employees*

I find in further agreement with the General Counsel and Unions that the Respondents did not meet their duty to bargain, in violation of Section 8(a)(5) and (1) of the Act, in bypassing the Unions and dealing directly with unit employees concerning terms and conditions of employment. This was done both by unilaterally preparing and sending copies of Hayes' above September 12 letter to former Holly Farms drivers offering them positions with Tyson under the lower Tyson pay plan and subject to other above-noted changes in employment conditions, and by the September activities of the Respondents' officials in thereafter meeting with groups of drivers to explain the new employment terms, to answer questions and, generally, to try to sell the new arrangement by direct discussions with bargaining unit drivers. That this conduct occurred is undisputed.

As noted in *Kenosha Auto Transport Corp.*:[202]

> It is settled law that an employer runs afoul of the statutory obligation where he bypasses a union which represents his employees and instead deals directly with the employees. See *Dallas & Davis Forwarding Co.*, 291 NLRB 980[, 985] (1988) . . . . The gravamen of the violation is that such conduct ''tend[s] to undermine the position of the union'' and is subversive of the mode of collective bargaining . . . ordained by the Act. See *NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747, 752 (6th Cir. 1974), and cases cited [therein].

[196] *Presbyterian Hospital*, 285 NLRB 935 fn. 3, 941 (1987).
[197] *Bronx Metal Polishing Co.*, 276 NLRB 299, 305 (1985).
[198] *S. Freedman Electric*, 256 NLRB 432 fn. 3, 440–441 (1981).
[199] *Phil Wall & Sons Distributing*, 287 NLRB 1161, 1166 (1988).
[200] See *Block-Southland Sportsmen*, 170 NLRB 936, 938 (1968); *Jo-Vin Dress Co.*, 279 NLRB 525, 532 (1986).
[201] 229 NLRB 844, 850–851 (1977).
[202] 302 NLRB 888, 896 (1991).

f. *The withdrawal of recognition from the Unions*

While the parties are in agreement that the Respondents, during the actual September 12 negotiating session, did not withdraw recognition from the Unions as bargaining representative for the drivers-yardmen unit in so many words, it is clear that, in view of the Respondents' announced unilateral changes that day, including plans to merge the Holly Farms bargaining unit completely into the Tyson Transportation system, with associated other unilaterally imposed changes concerning work locations, rates of pay, work hours and scheduling, future job benefits, and other employment terms, the bargaining to be permitted the Unions would be limited both as to scope and duration. In this regard, the Respondents, at that meeting, refused to furnish the requested Tyson/Holly Farms merger agreement which, the Unions were informed, contained those Companies' agreement concerning the future of unit employees' job benefits; advised the Unions that Holly Farms, not Tyson, was prepared to continue bargaining, but only as to the impact of the announced unilateral changes on the employees; and that contract negotiations could continue only until such time as the Respondents considered the old Holly Farms unit to have been completely merged into the Tyson Transportation system. After that, the Unions would have lost their majority status and the unit would have ceased to exist. In subsequent correspondence, described above, the Unions were advised that integration was completed and recognition was withdrawn.

All this occurred during the Unions' certification year.

Administrative Law Judge Evans, in his Board-approved decision in *Den-Tal-EZ, Inc.*,[203] citing *Kimberly-CIark*[204] noted that, to promote industrial peace, ''the Board has consistently interpreted the statutory framework to require that its certification of collective bargaining representatives be essentially uncontestable for a period of 12 months.'' Judge Evans continued as follows:

> In *Brooks v. NLRB*, 348 U.S. 96 (1954), the Supreme Court approved the *Kimberly-Clark* rule stating that a certification based on an election must be honored for a ''reasonable period, ordinarily one year,'' in the absence of ''unusual circumstances'' such as (1) a schism within the certified union, (2) the defunctness of the union, or (3) radical fluctuation in the size of the bargaining unit within a short period of time. Absent such circumstances, ''self-help,'' in the form of a refusal to bargain based on doubts of a union's continuing majority status, is available only after the expiration of the certification year.

The only ''unusual circumstance'' argued by the Respondents here to justify their withdrawal of recognition from the Unions was the increased size of the drivers' group after they had merged the drivers unit employees into the larger Tyson Transportation system. However, it had been found above that instead of retaining Holly Farms' unit employees under initially different employment terms as it then was privileged to do under *Burns*, supra, by the time Tyson made the relevant changes, 2 months after the takeover, the existing employment terms had become established and were not subject to unilateral change, either as to the initial decision or as to the effects of such a decision. Therefore, the unilateral changes in pay, work locations, schedules, and other terms of employment resulting from the merger,[205] and the merger process, itself, which had increased the size of the unit, were unlawful refusals to bargain.

In so concluding, I note that Tyson took over Holly Farms with full knowledge of Holly Farms' bargaining obligations. The status of bargaining was intensively discussed by Tyson and Holly Farms management during July 14–15 meetings, and such knowledge was carried forward when Tyson brought almost all Holly Farms managers into its own organization. Nor was integration of the two trucking systems a new idea warranting delay. On January 24, about 6 months before Tyson assumed control and while its purchase bid was pending, Tyson Vice President Irwin, at the request of Don Tyson, that Company's chief executive officer, had drawn up an initial outline for precisely such a merger.

Accordingly, I conclude that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Unions as bargaining representative of the drivers-yardmen unit[206] particularly since such withdrawal occurred during their certification year.[207]

By unilaterally changing the wages and other terms and conditions of its former Holly Farms drivers and yardmen without giving the Unions an opportunity to negotiate concerning the relevant decisions, Tyson further violated Section 8(a)(5) and (1) of the Act.[208]

g. *The unilateral changes in job benefits, including retirement*

As noted, the Unions were notified during the September 12 negotiating sessions and thereafter that, in accordance with the terms of the Tyson/Holly Farms merger agreement, the superior above-described Holly Farms job benefits package, including the pension plan, would be continued intact by Tyson for its former Holly Farms eastern division employees for 2 years after Tyson's assumption of control.

Live haul driver Dimmette[209] testified without contradiction that from the Respondents' December 1989 correspondence and at a January 1980 meeting conducted by Personnel Manager Mathis, he and other employees were informed by Tyson's management that, in September 1991, about 2 years after the effective date of Tyson's takeover, the Holly Farms pension plan would be terminated and the employees paid off. Although the changes affecting fringe benefits, including pension, for Tyson's former Holly Farms eastern employees were deferred for 2 years, those changes, including the 2-year continuation period, had not been negotiated with the Unions. This deferred, but unilaterally imposed change in the duration of the retirement plan and other jobs benefits was violative of Section 8(a)(5) and (1) of the Act.

[203] 303 NLRB 968 (1991).
[204] 61 NLRB 90 (1945).
[205] *Jo-Vin Dress Co.*, 279 NLRB 525, 532 (1986).
[206] *Phil Wall & Sons Distributing*, 287 NLRB at, 1165–1166.
[207] *Den-Tal-EZ*, supra.
[208] *Jo-Vin Dress Co.*, supra.
[209] While Dimmette was a live haul unit, rather than transportation unit employee, his testimony was germane to both groups.

h. *The refusal to furnish the requested merger agreement*

The General Counsel and Unions contend that the Respondents further failed to bargain by refusing the Unions' request that they be provided with a copy of the merger agreement between the two Companies. This request, originally made during the September 12 negotiating session, came after the Respondents had informed the Unions that, in accordance with that merger agreement, fringe benefits for former Holly Farms eastern employees in Tyson's employ would be continued by Tyson for 2 years after the effective date of the merger agreement.

This arrangement was highlighted in David Hayes' September 12 letter to Holly Farms drivers offering them jobs with Tyson. Hayes' letter specifically informed the drivers that ''Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement.''

While the Unions' initial September 12 request was made orally, they repeated their demand for the merger agreement several times thereafter in written correspondence to the Respondents and, in one such letter, offered to enter into a confidentiality agreement concerning that document to meet any of Tyson's concerns in that reward. It, of course, is the Unions' contention that such information was necessary for the fulfillment of its bargaining responsibilities.

The Respondents answered by repeatedly advising the Unions that they were not entitled to the document. The Respondents' attorney, Hogg, in correspondence, notified the Unions that he had attended negotiating sessions since the Tyson stock purchase only as counsel to Holly Farms and that, since Tyson had no bargaining relationship with the Unions, that Company had no duty to furnish the requested merger agreement. He later advised that Holly Farms, too, had no such obligation as that company's separate existence had ceased following its completed integration into Tyson during the fall of 1989. Hogg, however, without conceding the responsibility of either Company to provide the merger agreement, included in his October 10 correspondence to the Unions a represented verbatim copy of the relevant merger agreement provision. Accordingly, the Respondents, while continuing to deny any duty to furnish the merger agreement, itself, contend that the issue is now moot as the relevant language of the merger agreement had been given to the Unions.

The General Counsel and Unions, asserting the Unions' entitlement to receive the entire merger agreement, reject the adequacy and timeliness of the provision set forth in Hogg's October 10 letter.

Administrative Law Judge Zankel, in his Board-approved decision in *Transcript Newspapers*,[210] stated the applicable legal principles:

> An employer's duty to bargain in good faith includes the obligation to provide information needed by a bargaining agent for the proper performance of its duties. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). The right to receive information arises by operation of the act itself, on an appropriate request and the scope of the right is limited only by considerations of relevancy. *Ellsworth Sheet Metal*, 224 NLRB 1505, 1507 (1976). In *Bohemia, Inc*., 272 NLRB 1128, 1129 (1984), the Board observed:
>
> > [A]n employer must provide a union with requested information ''if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative.'' *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980); *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). The Board uses a liberal, discovery type standard to determine whether information is relevant, or potentially relevant, to require its production. *NLRB v. Truitt Mfg. Co*., supra. Information about terms and conditions of employment of employees actually represented by a union as presumptively relevant and necessary and is required to be produced. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).
>
> Requested information that is not so apparently related to a union's bargaining obligations is not presumptively relevant. In such situations, there must be a demonstration of relevance. *NLRB v. Rockwell Standard Corp*., 410 F.2d 953, 957 (6th Cir. 1969). Information not presumptively relevant nonetheless may have an ''even more fundamental relevance that than considered presumptively relevant.'' *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969). Not all relevant information need be disclosed. If the information is of a confidential nature, it may be withheld until appropriate safeguards are provided. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979).

In agreement with the General Counsel and Unions, and in accordance with the above authority, I find that the merger agreement is the most authoritative and reliable source concerning what Tyson and Holly Farms had agreed regarding continuation of Holly Farms job benefits for former Holly Farms employees in Tyson's employ and that the single provision from that agreement later quoted to the Unions was inadequate. The provision, as set forth in Hogg's October 10 letter, is difficult to decipher apart from the overall agreement. In this regard, language in the quoted provision that ''following the Effective Time, the Surviving Corporation will provide for a period of two years after the Effective Time employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employee benefits . . . which are no less favorable in the aggregate than the employees benefits provided . . . for such employees by the Company as the date hereof,'' raises other questions. These include (1) whether the parenthesized phrase, on its face, precludes employees from receiving the continued employee benefits if those employees were members of a collective-bargaining unit or a labor union and (2) what was the actual date of the merger agreement. With respect to the first question, it would appear from the language used that, contrary to the testimony and representations, including those made to Holly

[210] 286 NLRB 124, 128 (1987), enfd. 856 F.2d 409 (1st Cir. 1988).

Farms drivers in the September 12 written job offers, that section 5.8 of the merger agreement did not apply to employees who belonged to a bargaining unit or union, which, at least, raises the possibility that such employees, to receive the benefits, might have been qualified under some other provision in that document. It, of course, also would be necessary to obtain the date of the merger agreement to determine the precise date for the expiration of those benefits.

Also, as in *Transcript Newspapers*, supra,[211] the merger agreement ''struck at the core of the employment relationship of the unit employees represented'' by the Unions because it may well have been ''the base instrument'' defining the relationship between Tyson and Holly Farms and containing other agreements affecting employees. Arguably, all of the Unions' problems in representing this unit since August can be traced to the merger agreement. As in *Transcript Newspapers*, noting that the merger agreement could have established each Company's role in the continued operation of the business; future operating plans and the status of fringe benefits for unit employees, who expressly were excluded from the coverage of the provided paragraph, I find that the entire merger agreement was necessary to enable the Unions to formulate intelligent and comprehensive bargaining proposals in fulfillment of their responsibilities as representative.[212]

Accordingly, I find that the Respondents' refusal to comply with the Unions' requests for a copy of the entire merger agreement between them was in violation of Section 8(a)(5) and (1) of the Act.

3. Tyson's duty to remedy Holly Farms' unfair labor practices

I find that Tyson, as successor, has the responsibility of remedying Holly Farms' unfair labor practices occurring prior to July 18, found above, because management representatives, Blake D. Lovette, Everett (Skipper) Solomon, A. Gerald Lankford, David Hayes, Barbara Mathis, David Fairchild, Sam Whittington, Ray Lovette, Larry Church, Al Bare, John Sloop, Bob Absher, and others, moved from Holly Farms to Tyson with full knowledge of Holly Farms' unfair labor practices.[213]

4. The alleged unfair labor practice strike—facts and conclusions

The General Counsel and Unions contend that a strike that began on October 1 among former Holly Farms drivers, represented by the Unions, was an unfair labor practice strike caused and prolonged by the unlawful and unremedied conduct of Holly Farms before July 18 and of Tyson since that date.

The Respondents argue that the evidence concerning the reasons for the strike was too confused and/or inadequate to show that the strike was caused or prolonged by unfair labor practices and emphasize that the strike, in any event, could not have been an unfair labor strike because it was not called in accordance with the Unions' bylaws. In this regard, the Respondents assert that the evidence does not show that a sufficiently large number of bargaining unit employees participated in the strike vote to have enabled the strike to be authorized in accordance with the bylaws. Although the seven Teamsters local unions were certified to jointly represent the drivers yardmen unit, the record contains evidence of a strike vote taken only by Local 391.

Local 391 Business Agent Reuben W. Brown[214] described the events leading to the strike.

Brown related that, on August 12, pursuant to notices issued to the drivers and yardmen 4 days earlier by Bruce Blevins, Local 391 secretary-treasurer, a strike vote meeting of those employees who, in Wilkesboro, were represented by Local 391 was held at a local motel. This was attended by 66 unit employees.

Secretary-Treasurer Blevins opened the August 12 meeting by reviewing and explaining to the membership the Respondents' negotiating proposals that had been given to him as union spokesman during the then recent negotiating sessions of August 8, 9, and 10.[215] At Blevins' request, Brown then read aloud every allegation of the latest consolidated complaint in this matter, which he had distributed to the employees as they came in. When he finished reading the complaint, Brown told those present that, in his opinion, the violations alleged were substantial and, in effect, that because of the nature and severity of the violations, a strike in response would be an unfair labor practice strike. Brown referred to a 10(j) injunction that counsel for the General Counsel then was seeking.[216]

Blevins then resumed the floor, telling the others present that before a strike vote could be taken, at least 50 percent of the eligible voters in that area would have to be available. He reiterated Brown's point that the complaint allegations were so severe that the Union would have to call an unfair labor practice strike, but told the group that the Union, at that time, only was seeking authorization from the employees to call a strike when the Union considered appropriate. Blevins overruled a motion for a standup vote, declaring that the vote would have to be taken by secret ballot. The ballots then were distributed, marked, and counted. The tally showed that 63 employees voted to authorize a strike, none opposed, with 3 abstentions.

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[211] Id. at 128.

[212] In concluding that the Unions are entitled to receive the complete merger agreement, I do not presume that the parties would be unsuccessful in reaching a mutually satisfactory agreement regarding the Unions' offer of confidentiality to be afforded that document. However, since the Respondents' refusals to supply that document were based on their position that the Unions simply were not entitled, rather than on confidentiality, any future inability of the parties to arrive at a confidentiality agreement should not relieve the Respondents of their duty to furnish the merger agreement.

[213] *Memphis Truck & Trailer*, 284 NLRB 900 (1987).

[214] Brown, an officer of Local 391 since 1968, was in charge from the inception of the Unions' organizing campaigns for the different units at Holly Farms.

[215] As noted, during those negotiating sessions, the Unions were notified of the Respondents' plans to unilaterally merge Holly Farms' western transportation division into its own larger system and to lay off 71 drivers and eliminate 47 tractors from the eastern division.

[216] The subject matter before the U.S. District Court, Nashville, Tennessee, in the 10(j) injunction proceeding related the above-considered discharges of Bouchelle, Barker, Huffman, and Richardson, and included Richardson's disputed status as a supervisor. That matter was resolved by a Court order issued October 26.

Although the Teamsters International union bylaws provided that, while a simple majority of 50 percent plus 1 vote would suffice to authorize rejection of a proposed contract, a two-thirds majority vote would be necessary in order to both reject a proposed contract and authorize a strike. Since Brown had information only about the 66 employees who participated in the Local 391-sponsored vote on August 12, he could not testify as to whether the employees represented by the 6 other Teamsters locals which, jointly with Local 391, represented the overall unit, also had voted to authorize strike action.[217] Therefore, the record contains no evidence that two-thirds of the employees in the relevant unit had voted to support a strike to be authorized in conformity with the International union's bylaws.

Brown also described certain relevant later meetings called by Local 391, which also led to the strike. One such meeting of Local 391 officials and mostly Wilkesboro-based employees took place on September 16, following the controversial September 12 negotiating session. Present were Local 391 President R. V. Durham; secretary-treasurer Blevins; the Unions' attorney, J. David James; Doug Morris, a business representative; and Murl Kelly, chairman of the Unions' negotiating committee. Also present were about 60 drivers and yardmen from Wilkesboro and 2 unit employees from Monroe. Durham and Blevins described what generally had taken place during negotiations, with Durham focusing on what had occurred during the September 12 session. Before Brown, who described the session, was obliged to temporarily leave the meeting, he heard Durham introduce Attorney James who began to speak of the legal ramifications. When Brown returned, the meeting was over. The only decision then taken was that, as James recommended, the employees should sign up to work for Tyson.

At the September 25 meeting of Blevins, Brown, and Kelly, it was agreed that Brown should get some of the employees together to find out if the employees still were as willing to strike as when the August 12 vote was taken. Brown complied, checking with a number of employees.

On the morning of September 30, Brown met with seven of the Respondents' employees and several union officials expected to be present when the picket line was setup. Brown told the group that he had a permit approved by the chief of police that the strike go forward on October 1 at 12:01 a.m. The strike commenced on schedule.[218]

I find no merit to the Respondents' argument that the strike that began on October 1 was not an unfair labor strike because not authorized by a two-thirds vote, as required by the International union's bylaws. The principle that a union in a bargaining relationship is the only party to determine whether its relevant internal rules have been fulfilled was expressed in *North Country Motors*.[219] In *North Country Motors*, supra, the respondent employer, in defending against the union's contention that it had failed to bargain by refusing to sign a fully negotiated, duly ratified collective-bargaining agreement, argued that, contrary to the union's bylaws, the union had failed to obtain appropriate ratification. The union, in fact, had had difficulty in obtaining ratification. After the employees twice had voted to reject an earlier tentative contract, the parties conducted further negotiations and reached a revised agreement which the union business agent optimistically had predicted to the employer would be ratified. However, only one member of the nine employee unit attended either of the two meetings the business agent thereafter had called to obtain ratification. Finally, only that employee voted, and his ratification of the agreement was cited to the respondent, over its objection, as fulfillment of that prerequisite.[220] In finding that the respondent had violated the Act by refusing to sign the negotiated contract, the Board held:

> we cannot agree . . . that the one vote ratification was in conflict with the policies of the Act. The Act imposes no obligation on a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf. In a case such as this, the requirement for ratification could only have been one which the Union itself assumed. It was thus for the Union, not for the Respondent, to construe the meaning of the Union's internal regulations relating to ratification. Whether the one-vote ratification in the circumstances here present was enough to satisfy the Union's bylaw requirement for ''approval by a majority vote of those present and voting at the meeting'' was a matter for the Union to decide, and not for the Respondent to challenge once assured by the Union that the latter's ratification requirements had been met.

Here, the right of the Respondents, jointly and separately responsible for many unfair labor practices, to properly determine whether the Unions had sufficiently complied with their bylaw provisions so as to conduct a valid strike in protest of the Respondents' own unlawful conduct, would appear to be even more remote than in *North Country Motors*. As in that case, the Unions' internal rules for authorizing strikes are their own affair, are not binding on the Board in determining whether, in fact, an unfair labor practice strike has occurred, and such internal rules certainly were not intended to provide refuge for the party whose unlawful conduct had precipitated the strike in the first place.

As the record shows that the strike occurred pursuant to a duly noticed strike vote at a meeting called for that purpose; that the vote to authorize strike action was taken against the background and in protest of the Respondents' unlawful conduct; and that the great majority of those in attendance voted in favor, I find that the strike that began on October 1, in which about 40 drivers joined,[221] was an unfair

[217] As noted, the six other Teamsters locals certified jointly with Local 391, based in Kernersville, North Carolina, were: Local 29 in Harrisonburg, Virginia; Local 71, Monroe, North Carolina; Local 355, Baltimore, Maryland; Local 592, Richmond, Virginia; Local 657, Seguin, Texas; and Local 988, Center (Houston), Texas.

[218] No unconditional offer to return to work and end the strike was made before the conclusion of the hearing.

[219] 146 NLRB 671, 674 (1964).

[220] In *North Country Motors*, supra, the union's bylaws provided for ratification by ''a majority vote of those present and voting at the meeting.'' The International union's constitution contained a similar provision.

[221] Since several of the 47 above-named drivers, found above to have been constructively discharged on September 22, testified that they joined the strike when it began on October 1, their testimony may have increased the perceived number of strikers. Actually the dischargees, who had been terminated before the start of the strike, retained their status as unlawfully terminated dischargees and did not

labor practice strike, caused and prolonged by the Respondents' unfair labor practices.

5. Refusals to bargain concerning the live haul unit

a. *The size and composition of the unit*

As noted, in accordance with the Board's Decision on Review and Order, dated July 20, 1989, in Case 11–RC–5583 partially reversing his June 20 Supplemental Decision and Direction of Election in that matter, the Regional Director found the following unit appropriate for purposes of collective bargaining:

> All live haul (chicken catching crews) employees employed at the processing facility of Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of Respondents at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

The Respondents maintain, as they have during the course of Case 11–RC–5583, that the live haul employees cannot appropriately be included in a Board-found bargaining unit because they are agricultural workers, exempt under Section 2(3) of the Act. In the alternative, the Respondents argue that, if the live haul workers are not held to be agricultural, then the above-described unit still would be inappropriate because their approximately 2000 Wilkesboro production workers were not also included.

I, of course, am bound by the Board's prior determination that the unit as described is appropriate.[222]

b. *Majority status*

In accordance with the parties' stipulation, I find that on March 31, the date when the complaints, as amended, allege that Local 391 had achieved majority status in the live-haul unit, that Union had 103 signed and dated authorization cards received from among the 201 employees then in the unit. Noting that the stipulation also affirms the authenticity of the signatures and dates on those cards, I conclude that on the critical date of March 31, a majority of employees in the bargaining unit had freely authorized Local 391 to represent them by signing unequivocal authorization cards.[223]

c. *The applicability of a bargaining order*

Having found that on March 31, Local 391 represented a majority of the Respondents' live-haul employees because of the employees' execution of authorization cards which, on their face, designated that Union as their exclusive representative for purposes of collective bargaining with the Respondents, it has been concluded that the Union was validly selected by a majority of the Respondents' employees as their exclusive bargaining representative in a bargaining unit found appropriate by the Board. The Union's subsequent loss of its majority status is not controlling for it must be pre-

later become strikers since, by October 1, they already had been removed from the payroll. Determination of the strikers' identities, if relevant, should be left to the compliance stage of this proceeding.

[222] In accordance with the Respondents' position that the live haul employees should be excluded from the unit because they were exempt agricultural workers, and with the requirements of the subsequent decision in *Camsco Produce Co.*, 297 NLRB 905, 908 (1990), where the Board determined that it would ''assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question,'' the parties entered into the following stipulation concerning the Respondents' live-haul operations:

> The live-haul department, meaning catchers and drivers, catch company-owned chickens at the grow-out farms and deliver those chickens to the processing department at the Wilkesboro processing plant. The grow-out farms have contracts with Holly Farms to grow the Holly owned chickens. All chickens caught and transported by live-haul from the farms to the plant are owned by Holly Farms. On occasion, Holly Farms buys live chickens from other producers of chickens not associated with Holly Farms that are caught and transported by Holly Farms live-haul from the outside source to the processing plant. The last time this occurred was October 1989 when Holly Farms bought approximately 60,000 chickens. During 1989, Holly Farms live-haul caught and transported a total of approximately 575,000 chickens from these outside sources spread over seven separate occasions. These were processed by the Wilkesboro processing plant. This outside purchasing was done when the processing plant ran short of chickens and when another producer had extra chickens. However, normally, when Holly Farms was short of chickens, so was the rest of the industry.
>
> Holly also buys approximately 2000 grown chickens a month from Pilch, which are hauled by Pilch to the processing plant in Wilkesboro. Live haul does not catch or haul these chickens with the exception that on January 23, 1990, one live-haul truck with a forklift picked up chickens from Pilch and hauled them to the processing plant. No catchers were involved. This will not occur again because it cost Holly Farms more to pick up those chickens than can be earned on them.
>
> During 1989, Holly Farms killed and processed approximately 96 million chickens at its Wilkesboro processing plant, which includes the approximately 575,000 purchased from outside sources that were transported by Holly Farms live-haul.

[223] The authorization cards obtained by the Union included blank lines for the employee's name, home address, telephone number, employer, employment date, city, and state of employment, date of birth, social security number, and date of application. The authorization card's heading and text, shown below, were followed by an employee signature line:

> APPLICATION FOR MEMBERSHIP IN LOCAL UNION NO. 391 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO
>
> . . . .
>
> I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. I authorize my employer to deduct from my wages and to pay to any authorized representative of Local Union 391 all sums as shall be certified by Local Union 391 to be paid in consideration of the representation provided to me by Local Union 391.
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> This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination of the agreement between the Employer and Local Union 391, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my signature thereto. This authorization shall go into effect immediately or on ratification of a collective bargaining agreement if one is not presently in effect: Union Dues not deductible as charitable contributions for Federal Income Tax purposes.

sumed that, but for the Respondents' unfair labor practices, that majority status would have been retained.

In considering whether a bargaining order was warranted to remedy an employer's unfair labor practices, the Board, in *Koons Ford of Annapolis*,[224] restated the applicable rule of *NLRB v. Gissel Packing Co.*:[225]

> In *Gissel*, the Court delineated two types of situations where bargaining orders are appropriate: (1) ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices; and (2) ''less extraordinary'' cases marked by ''less pervasive'' practices.[5] Thus, the court placed its approval on the Board's use of a bargaining order in ''less extraordinary cases'' where the employer's unlawful conduct has a ''tendency to undermine [the union's] majority strength and impede the election processes.''[6] The Court indicated that when the unfair labor practices are less flagrant and the union at one time had a majority support among the unit employees the Board may consider
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> > the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[7]

[5] *Gissel*, supra at 613–614.
[6] Id. at 614.
[7] Id. at 614–615.

In finding that a bargaining order is justified in the present matter, I conclude that the Respondents' unfair labor practices would come within the second *Gissel* category, described above.

Affecting the live-haul unit, the record discloses numerous instances during which the Respondents' officials in the Wilkesboro complex, including A. Gerald Lankford, Holly Farms' vice president for human resources; Sam Whittington, the live production manager; Ray Lovette, the live-haul manager; David Minton, a live-haul superintendent; Barbara Mathis, the personnel manager; and Dean Grimes, a live-haul dispatcher/supervisor, variously threatened to cause the arrest of any employees caught distributing union literature in nonwork areas on company property during nonwork time; maintained and enforced an unlawfully broad no access/no distribution rule prohibiting union activities in nonwork areas of company property during nonwork time; granted an unlawful pay raise 4 weeks before the representation election; threatened an employee-union activist with discharge; gave the same employee a written warning and threatened yet another employee that this activist employee would be terminated; repeatedly interrogated employees concerning their union sentiments; repeatedly solicited, promised to remedy, and actually remedied, employees' grievances by expanding the workweek; impressed employees with the futility of supporting the Union; informed employees that if the Union were selected as bargaining representative, the Company would know how they had voted; inhibited and threatened unspecified retaliation for wearing union insignia; discriminatorily removed and excluded union materials from company live-haul department bulletin boards; and, after the election, announced that the Respondents unilaterally would end the Holly Farms pension plan for live-haul and transportation department unit employees at a specified later date.

As in *J. J. Newberry Co.*,[226] the Respondents' grant of substantial economic benefits in violation of Section 8(a)(1) of the Act, such as the wage increase and the expanded workweek,[227] are hallmark violations ''sufficient to render it unlikely that a fair election could be held. Thus the Board has long recognized that employees are not likely to miss the inference that 'the source of all benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged.' *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) [other citations omitted].'' Here, the Respondents' granting of unlawful economic benefits were only two of numerous unfair labor practices directed at live-haul unit employees and intended to undermine the Unions' majority status. Accordingly, even without regard to the Respondents' unlawful conduct affecting its employees outside of the live-haul unit, I find that a bargaining order is necessary and justified to protect the majority sentiment expressed through authorization cards and to remedy the violations committed.

However, concurrently with its antiunion campaign among the live-haul unit employees and also affecting them, the Respondents committed serious violations of the Act against neighboring employees based in the same Wilkesboro complex who belonged to the drivers-yardmen unit and others who were plant workers. Respondents' officials responsible for such violations occurring before the July 27 live-haul election included Blake D. Lovette, Holly Farms' president and chief operating officer; David Hayes, vice president for transportation; A. Gerald Lankford, vice president for human services; Larry Church, chief of security; Bob Absher, head dispatcher; John Sloop, driver-coordinator; and Murl Murphy, supervisor/dispatcher.[228] These individuals, between them, repeatedly threatened unit drivers that, whether or not they chose the Unions to represent them, Holly Farms trucking operations would be discontinued, the trucks gold, the hauling service contracted out and their jobs lost; maintained and discriminatorily enforced unlawfully broad no-access/no-distribution rules; threatened to arrest six off-duty employees for engaging in union handbilling in nonwork areas on their own nonwork time; caused the arrest and issued written warnings to three employees for engaging in such activities;

[224] 282 NLRB 506, 507 (1986), enfd. 833 F.2d 310 (4th Cir. 1987), cert. denied 108 S.Ct. 1574 (1988).
[225] 395 U.S. 575 (1969).
[226] 249 NLRB 991, 993 (1980), enfd. in relevant part denied 645 F.2d 148 (2d Cir. 1981). Also see *Pembrook Management*, 296 NLRB 1226 (1989), citing *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1282 (1979), and *Tower Records*, 182 NLRB 382, 387 (1970).
[227] As noted, in May, the workweek had been increased from 4 to 5 days in the effort to remedy grievances Ray Lovette had unlawfully solicited from live-haul drivers.
[228] As noted, all of the aforesaid Holly Farms officials accepted generally comparable positions with Tyson, except that Sloop was promoted to an even more responsible position as Tyson's manager, personnel, and safety, Wilkesboro.

threatened employees with unspecified reprisals for having supported the Unions; discriminatorily discharged four plant employees for having engaged in union activities; and prohibited a plant employee from discussing his pay rate with fellow employees.

The Respondents' conspicuous unlawful conduct affecting neighboring employees in the drivers-yardmen unit continued after the live-haul election and the Tyson takeover. Such activities included the Respondents' unilateral merging of the eastern and western divisions of the existing drivers-yardmen unit into the Tyson Transportation system; the Respondents' unilaterally imposed relocations and changes in the wages, hours, and other terms and conditions of employment affecting employees in that unit; the withdrawal of recognition from the Unions during their certification year as bargaining representative; the bypassing of the Unions and direct bargaining with those employees; and the constructive discharges of 47 drivers who declined to accept the Respondents' unlawful unilaterally imposed employment terms. Such postelection conduct tactically positioned the Respondents to gain an advantage in the event of a new election, reducing the efficacy of such an election.

The Respondents, however, argue that in determining the applicability of a bargaining order for the live-haul unit, only unlawful conduct directed at employee members of that unit should be considered and that, therefore, their actions affecting employees within the drivers-yardmen unit or those who worked in the plant is not germane. While, admittedly, most *Gissel* bargaining orders are issued on the basis of unlawful conduct directly affecting employees of the subject unit, this is not necessarily the case.

In *J. P. Stevens Co.*,[229] in the context of repeated, aggravated violations found in the series of cases involving that company, the Board held that it was appropriate to extend the bargaining order issued in that matter to all J. P. Stevens facilities where the union's representative status already had been established. This provided a remedy of corporatewide scope unlimited by proof that employees in other of that company's facilities, who might be affected by the bargaining order, actually knew of or were affected by the specific unfair labor practices that had led to the issuance of the bargaining order in the adjudicated matter. In providing this broader remedy in *J. P. Stevens*, supra, it was noted that:

> the plants were contiguous; that since the policies which gave rise to the unfair labor practices were centrally developed, there ''was every reason to believe that if not deterred, [the Company] would pursue the same discriminatory policies throughout the region''; and that ''the Company's practices were so extensive and so well publicized that they must inevitably have had a coercive impact at the remaining plants.'' [Citations omitted.]

While the Respondents' conduct in the present matter, of course, differs from that described in the *J. P. Stevens* series, the Respondents here, nonetheless, have engaged in numerous unfair labor practices of the most serious nature, pervading the Wilkesboro complex and beyond. Although enacted in a smaller, more localized setting than were the *J. P. Stevens* cases,[230] the Respondents' conduct, principally affecting employees in the Wilkesboro complex, was intensely concentrated.

As in *J. P. Stevens*, supra, at the Wilkesboro complex, the live-haul facilities were contiguous with the plants and, before the autumn merger of trucking operations, live-haul also was contiguous with the nucleus of the eastern division transportation department. Labor relations policies always were centrally controlled. Before Tyson, Holly Farms' labor policies were governed from Wilkesboro by Blake Lovette and Lankford, assisted by Personnel Manager Mathis. After the takeover, such policies became centrally controlled from Springdale, with local substantial input from Lovette and Lankford, who continued to function for Tyson in much the same way. The Respondents' unilateral merger of the former Holly Farms transportation division into the larger Tyson Transportation system; the relocation of the Wilkesboro terminal and persons employed there; the attendant changes in the affected employees' wages and working conditions; the constructive discharge of 47 drivers resulting from those unilateral changes and the Respondents' abrupt withdrawal of recognition from the Unions during their certification year, were overt, conspicuous, and highly publicized actions by, perhaps, the area's largest employer.

The Respondents did not try to conceal from live-haul employees their unlawful conduct affecting employees in other units. When, as found above, Lankford, in the first week of April, told at least one meeting of live-haul employees that there would be no union handbilling on company property, that three employees had been arrested for engaging in such activities and that he did not need any more arrests, he, of course, was referring to the arrests of Branscome, Hester, and T. R. Hayes of the drivers-yardmen unit. When that incident occurred, the Unions already had been certified as representative of the drivers-yardmen unit and the three drivers were assisting Local 391 in organizing other groups of employees. Accordingly, when Lankford, to discourage support for the Union, attempted to gain additional impact from the arrests of the three drivers by mentioning the incident to live-haul employees, he not only crossed unit lines, himself, to describe to live-haul employees what Holly Farms had done to its other employees for handbilling and, likewise, was prepared to do to them should they engage in such conduct, but also informed the live-haul workers of the existence of the unlawfully broad no-access/no-distribution rule that was being enforced on company property. As found above, in that same time frame, plant employee Dowd also was told of these arrests by a security guard as she walked through a company parking lot holding union authorization cards in her hand. The guard, as found above, was acting as a company agent when he spoke to Dowd.

It, therefore, is not reasonable to assume, as urged by the Respondents, that the live-haul employees, at the time, were ignorant of the Respondents' unlawful conduct occurring on parking lots and in the complex around them, and which, in instances, was called to their attention by members of management for the Respondent's own purposes.[231]

[229] 239 NLRB 738, 770–771 (1979), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980).

[230] J. P. Stevens, Inc., had more than 40 plants scattered throughout several States.

[231] *J. P. Stevens Co.*, 247 NLRB 400, 492 (1980), cited by the Respondents, is inapplicable. That case merely denied the General

Continued

Contrary to the Respondents, I do not find it significant that the Union has not formally requested the Respondents to recognize and bargain with it with respect to the live-haul unit. When, on February 15, the Union, in a letter from organizer R. W. Brown to Holly Farms president, Blake D. Lovette, did request recognition for a larger unit that the Union then considered appropriate[232] and had asked for an opportunity to demonstrate its card majority, the Respondents did not reply. Since then, the Respondents, unlike the Union, have continued to contest the appropriateness of the unit later found by the Board. The Respondents have made plain that they will continue to litigate the composition of the live-haul unit, that they will not grant voluntary recognition to the Union; and, as found above, the Respondents have sought to counter the Union's organizational efforts by numerous unlawful acts.

Accordingly, the absence of a proper demand for recognition and bargaining does not foreclose the propriety of a bargaining order as a remedy for the Respondent's unfair labor practices,[233] and the absence of such a demand here can be excused as futile.[234]

Without regard to whether, as the Respondents seek to argue, employee turnover has sufficiently cured the effect of any employer misconduct so as to allow the conduct of a fair election,[235] such evidence would not remove the bases for a bargaining order. The unlawful conduct in this matter was participated in by the Respondents' highest officials, all of whom, at the time of the hearing, were still in either the same, or in substantially equivalent, positions. Aspects of the Respondents' unlawful conduct also were directed at virtually every employee in the unit and, as noted, also at other groups of employees contiguous to the live haul unit. As the ranking members of management and virtually all supervisors and agents who were involved in the unfair labor practices still are in place and continue in charge of the Respondents' relevant operations; as the scope of their unfair labor practices show that the Respondents, through them, are firmly committed to their antiunion positions from which they are unlikely to retreat; and as these unfair labor practices were numerous, egregious, and pervasive, it is foreseeable that new employees would learn of past practices and also be deterred from seeking union representation.

Although time has passed since the Respondents' pattern of unlawful activity, the Board and courts have found that where, as here, the Respondents' unfair labor practices have been serious and pervasive and that conduct which could adversely influence employees in their freedom to choose a collective-bargaining representative continued even after the representation election, the lasting effects of such conduct cannot be eradicated by the mere passage of time. While passage of time is regrettable, it is not a sufficient basis for denying a bargaining order.[236]

From the many serious violations found, I conclude that the possibility of ending the effects of the Respondents' unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondents simply to refrain from such conduct will not eradicate the lingering effects of the violations and an election will not reliably determine genuine, uncoerced employee sentiment. Therefore, I find that the employees' sentiments concerning representation, expressed here through authorization cards, would be better protected by issuance of a bargaining order than by traditional remedies.

Accordingly, the Respondents should be required to bargain with the Union as the duly designated representative in the live-haul unit found appropriate, as of April 3, 1989,[237] the date the Respondents embarked on a clear course of unlawful conduct after the Union had acquired authorization cards from a majority of employees in the unit.[238]

E. *The Challenged Ballot and Objections to the Election in Case 11–RC–5583*

1. The challenged ballots

a. *Tony L. Clark—facts*

At the election, the Board agent challenged the ballot of Tony L. Clark on the ground that his name did not appear on the voting eligibility list. Other ballots cast also were challenged on assorted grounds with a result that the challenged ballots were determinative. However, by early December, the challenges to all cast ballots, except that of Clark, had been resolved. The challenges to some ballots were sustained, but the challenges to three ballots were overruled and those ballots were opened, counted and a revised tally of ballots issued. The revised tally of ballots showed that 95 votes had been cast for and that 95 votes had been cast against the Petitioner, Local 391, and that it would be necessary to decide the sole remaining unresolved challenged ballot, that of Clark, in order to determine whether the Petitioner had obtained a majority of the valid votes cast in the election and, accordingly whether Local 391 should be certified as bargaining agent.

As noted, the Union asserts that Clark was eligible to vote because, during the payroll eligibility period and election, he

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Counsel's request for a prospective bargaining order that would cover future bargaining requests anywhere in that Company's extensive enterprise should the Union secure a card majority or certification at any Stevens' facility. Even though J. P. Stevens had shown a pronounced disposition to violate the Act, the Board simply held that each requested *Gissel* bargaining order must be assessed on its own merits. This *J. P. Stevens* case differed from the earlier *J. P. Stevens* case, cited by me where the bargaining order was not prospective since extended only to other facilities where the Union's representative status already was established.

[232] The Union, on February 15, had requested recognition for hatchery, live haul and feed haul employees at Wilkesboro, North Wilkesboro, and Roaring River, North Carolina, and at four other locations.

[233] *Color Tech Corp*., 286 NLRB 476 (1987).

[234] *Westinghouse Broadcasting*, 285 NLRB 205, 214 (1987).

[235] At the hearing, consistent with *Highland Plastics*, 256 NLRB 146, 147 (1981); *Salvation Army Residence*, 293 NLRB 944, 944–945 (1989); *International Door*, 303 NLRB 582 (1981), the Respondents' proffered evidence concerning employee turnover was rejected.

[236] *Quality Aluminum Products*, 278 NLRB 388, 340 (1986), enfd. 813 F.2d 795 (6th Cir. 1987).

[237] On about April 3, Live Haul Manager Ray Lovette began his series of meetings with live-haul drivers during which he unlawfully interrogated them and solicited and promised to remedy their grievances.

[238] *Color Tech Corp*., 286 NLRB at 478.

shared a community of interest with employees in the live-haul department. The Employers, arguing against Clark's eligibility, maintain that he did not work in live-haul.

The circumstances of Clark's association with the live-haul department, which lasted from April through November, were litigated in detail. For about 13 years before November, when he was transferred completely away from live-haul to work under Tommy Robinson, sanitation manager in the Respondents' main processing plant, Wilkesboro, Clark had driven a spray truck used to wash down company streets. He also spray washed around the Wilkesboro live haul exterior areas,[239] the administrative offices, the executive office and plant parking lots, three hatcheries, the outside grounds and parking lot at the feed mills in Roaring River,[240] and the sheds at the three service centers.

For more than 12 of Clark's first years on the spray truck, until April 1989, he worked out of the Holly Farms shave and spray department in an area about 2 miles from the Wilkesboro complex, called ''the bottom.'' About 30 employees reported to work there. Ray Huffman, manager of the shavings department, whom Clark regarded as his supervisor while based at that department, related that, in 1989, his department had been assigned 11 shavings trucks and 5 spray trucks.[241] The shavings trucks, operated by six drivers, were used to pick up leftover wood chips from lumber yards and to carry these wood shavings to the growers' farms to be used to line chicken house floors. Seven more drivers were permanently assigned to the tank spray trucks. These trucks used hoses and nozzles to produce a moist fog to wash and disinfect the chicken houses. The sprays from those trucks differed from the powerful, ground-directed currents produced by Clark's vehicle, intended to wash blood, offal, grease, and sometimes even truck oil, from the ground. The sprays from Clark's truck, if so directed, would have been strong enough to kill, drown, or bruise the chickens and damage the chicken houses. While at ''the bottom,'' and afterward, only Clark drove his spray truck. He did not interchange with other drivers. Shave and spray employees did not participate in the election among the live-haul, feed mill, feed haul, and service center 3 employees and Local 391 does not now seek to represent them.

At the ''bottom,'' Clark clocked in and out at shave and spray and parked his truck there at the end of his shift. Although Clark technically reported to Huffman during that period, Huffman actually was not there when Clark was on the job as Huffman worked from 7 a.m. to 5:30 pm., while Clark worked from 7 p.m. to 3:30 a.m Clark's work was largely repetitive, he generally knew what he was expected to do. Huffman, as needed, would leave Clark messages with the security guards. While working out of shave and spray, Clark's compensation was changed to that department's payroll and he wore the same blue uniform as other shave and spray employees. His truck was serviced by service center 2, then located at ''the bottom.''

In performing his work, Clark followed a schedule prepared for him by Everett (Skipper) Solomon, then Holly Farms' vice president for North Carolina operations.[242] Under this schedule, Clark, at Wilkesboro, usually took 4 hours to spray-wash the roads, parking areas, and all grounds around live-haul. He also took additional time to spray-wash around the processing plant which, like live haul and other above areas, he washed every day.

Clark spray-washed around the Roaring River feed mill, the hatcheries and the service centers at different intervals. The feed mill and the three service centers[243] were washed every other week, and the hatcheries were washed once each week.[244]

Clark related that, on two or three occasions during his approximately 12 years at shave and spray, he was assigned by Huffman to wash down the chicken houses, at which time he also used a hose affixed to his truck. While at shave and spray, he similarly used the hose attachment to wash the chicken cages and the flatbed trucks used to transport them.

Clark testified that while be still was at shave and spray, the Company moved many of the spray trucks, excluding his own, from that department to live-haul where they no longer were driven by shave and spray personnel, but by employees assigned to live-haul.

Clark averred that in April Huffman told him that the Company was going to have to move him from ''the bottom'' to live-haul because the night shift at shave and spray, on which he had been working, was being ended and as he was the only night-shift employee there. Clark was informed that he would start at live-haul the next evening and would continue to work the same hours there as at shave and spray.

Accordingly Clark reported to the live-haul department at the Wilkesboro complex the following evening where the personnel department gave him a timecard to use in conjunction with the like haul timeclock in the recreation room within the live-haul building. Clark continued to punch in and out at that timeclock until his November transfer to the plant.

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[239] The live-haul facilities around which Clark's truck washed consisted of office and scales areas leading to receiving docks. Trucks that brought in caged chickens just caught at growers' farms, would pass over the scales and be unloaded and uncaged by plant workers near the receiving docks. Droppings, feathers, offal, blood, grease and other byproducts of the unloading and plant production processes provided much to clean in the vicinity.

[240] Roaring River, as described in the Regional Director's supplemental decision, is about 15 miles from the Wilkesboro complex. The Respondents' 21 feed mill workers produced feed which was driven by the 27 feed haul drivers to the contract growers' farms. The feed haul drivers' trucks were serviced by mechanics at service center 3, also located at Roaring River. These Roaring River employees, including those at the service center, all were included in the live-haul unit.

[241] Huffman, however, regularly operated only 6 of the 11 shavings trucks and 4 of the 5 spray trucks—keeping 1 spray truck as a spare.

[242] After the merger, Solomon became the regional manager for Tyson's North Carolina operations, essentially continuing in the same position.

[243] The service centers were located as follows: service center 1, at the Wilkesboro main processing plant, serviced trucks used for long haul and live-haul transportation. Service center 2, at the shave and spray facility, about 2 miles from the Wilkesboro complex, maintained shaving trucks and the spray trucks kept there. Service center 3, at Roaring River, approximately 15 miles from Wilkesboro, serviced feed mill, hatcheries, and some pullet trucks. Employees at service center 3 were included in the live-haul unit with the other applicable Roaring River employees.

[244] The hatcheries attended by Clark were at Broadway, Fair Plains, and Hayes, located, respectively, 4, 5–6, and 10 miles from the Wilkesboro complex. Hatchery employees were excluded as agricultural from the live-haul unit, although their inclusion originally was sought by the Union.

Clark testified that, after his timecard was moved to live-haul, his job remained the same as before except that at live-haul he, for the first time, was called on to do extra spray work. This included spraying anywhere there was a gas or oil spill. This included such spills in live-haul or in the main processing plant areas, immediately adjacent to live-haul. He, also for the first time, was expected to flush out the water-draining manholes to keep them from stopping up.

Clark continued to spray wash the same areas as before being moved to live-haul, allocating about the same time periods to each location. The principal difference involved in the change was that, at live-haul, he began to park his own car in a fenced lot used by live-haul employees and on-premises U.S. Department of Agriculture representatives. His truck no longer was parked at ''the bottom'' but was garaged at the former forklift shop at the Wilkesboro complex. The door to the forklift shop was modified to accommodate Clark's truck.

As described above, the live-haul department and Roaring River employees who voted in the election were parts of the Respondents' live production division. Employees in that division also worked at the hatcheries; prepared and transported feed to the contract growers on whose farms the chickens were raised; washed down and, in the summer, water-cooled the chicken houses; and caught, cased, and transported the chickens to the processing plant receiving areas.

Within the unit, the live-haul chicken catching crews consisted of chicken catchers and live-haul drivers, all of whom used the live haul timeclock at the Wilkesboro complex. As noted, the live-haul drivers then would transport the chicken catchers to the growers' farms where the catchers would spend the rest of their shift manually catching and caging chickens. The filled chicken cages would be loaded onto flatbed trucks and driven by live-haul drivers over the Wilkesboro live-haul scales[245] to the unloading docks where the chickens were unloaded, stored in sheds, and uncaged by plant workers who shackled them, inverted, onto a conveyor leading into the plant. The live-haul drivers then would return to the farms to pick up additional loads of caged chickens. At the end of the shifts, which varied in length based on the amount of work, the live-haul drivers transported the catchers back to the Wilkesboro live-haul area, where they all clocked out.

Clark never worked as a chicken catcher or as a live-haul driver and his only function at Roaring River was to spray wash the above-described areas.

Clark's street washer spray truck differed from the approximately eight other spray trucks kept at live-haul or at shave and spray in that his truck was a tandem vehicle with body bolted to the chassis, while all, but two, of the other trucks were tractor-trailer vehicles with detachable tank-type trailers. These other two vehicles also were tandem. While Clark's truck was equipped underneath with nozzles, the trucks used in live-haul had hoses with pumps. The hoses were unrolled at the frame to gently spray-cool the chickens. Apart from those differences, the trucks essentially were the same with rear water tanks.

[245] The known weights of the trucks were subtracted from the gross weight to determine the weight of the load.

The live-haul spray trucks, used only in summer to wet cool the chicken houses and chickens, differed from the year-round spray washing and disinfecting function of the shave and spray trucks. Unlike shave and spray, live-haul spray trucks were not operated by permanently assigned drivers, but by live-haul drivers not immediately working with chicken-catching crews.

On nights when the weather was too cold to operate the spray trucks, Clark helped Plant Sanitation Manager Robinson, on cleanup.

Clark's testimony that, during his months at live-haul, he reported to Chris Shumate, the live-haul scales operator, who would tell live-haul crews what to do and take crews out, is disputed by the Respondents. According to Clark, on an occasion when his truck had a flat tire while at the Hayes hatchery, he called live-haul, and spoke to Shumate. Shumate had told him to stay where he was and notified the service center which sent someone to fix Clark's truck.

Shumate,[246] who worked from 4 p.m. to 1 a.m., denied that Clark had reported to him or that he had given Clark work instructions, including directions to blow out the manholes—which was done twice a week.

In addition to his work on the scales, Shumate, for the preceding 2 years, before leaving at the end of his workweek, had removed the old timecards from the rack and put in new ones because he was the last to leave. He left the removed timecards on the desk of live-haul secretary Betty Lankford. However, Shumate would leave Clark's timecards in the rack as Clark had told Shumate that he would take care of that himself.[247]

Jerry Blevins, second-shift manager of the main processing plant, Wilkesboro,[248] and Plant Sanitation Manager Tommy Robinson, who reported to Blevins, both testified that Robinson had been responsible for Clark's work for about 8 to 10 years.[249]

On August 10, Blevins had had occasion to discipline Clark. Having received employee complaints that Clark was taking too long on breaks, Blevins discovered, after checking, that Clark had stayed in the switchroom near the grease trap for 1 hour and 40 minutes. Blevins, joined by other plant supervisors, including Robinson, spoke to Clark in the switchroom. Blevins told Clark that he had been where he was for the above-described period; that it would be necessary for Blevins to set a time for Clark to take his break; that Clark, thereafter, would take his break from 11:30 p.m. to midnight; that his words constituted a warning; and that if he caught Clark on break at any tine other than the specified period, he would dismiss him. Blevins then filed with

[246] Chris Shumate, employed by the Respondents for about 14 years, had worked the live-haul scales for the last 2 years. Before then, he had been a live-haul driver.

[247] Shumate drove Clark's truck only once, when he picked it up from the shavings department for maintenance. He had never operated it as a spray truck.

[248] Blevins, who has held his position for about 8 years, was responsible for approximately 900 employees who reported to him through intermediate supervisors. Blevins related that, in spite of the large number of employees who worked under his general supervision, he knew Clark well from a time 15 years before when Blevins had been his line supervisor. Blevins' hours were from 2 p.m. to 4 a.m.

[249] Plant employees, specifically sanitation workers under Robinson, were not included in the live-haul.

the personnel office a written disciplinary notice recording this incident.[250]

Robinson, who worked from 7:30 p.m. until 6 a.m., had been plant sanitation manager for about 20 years, with sanitation responsibilities for the external and internal plant areas, live haul, the streets, and the receiving and hanging docks.

Robinson testified that included in his long-term supervision of Clark was responsibility for approving Clark's vacations, which he could do only if a replacement was available. In 1988 and 1989, he could not find replacements and, therefore, could not permit Clark to take off requested time.

Robinson also set Clark's work priorities. Since the U.S. Department of Agriculture inspected the receiving areas at 6 a.m. daily, Clark would have to wash that area each night between midnight and 12:30 a.m. Although Clark did not work for Live Haul Manager Ray Lovette, as testified to by both Lovette and Robinson, Lovette has called Robinson to ask him to get Clark to throw water in drains to unstop them and to keep Clark from putting water on the scales.

Clark was paid at an hourly rate about 28 cents below that afforded the 93 employees under Robinson.[251] He continued to wear the same blue uniform as he had at shave and spray. This uniform also was worn by live-haul employees and by Robinson's plant sanitation workers. Other plant workers wore white uniforms.

Robinson testified that the live-haul timeclock used by Clark between April and November was used only by live-haul employees, except for Clark and two women on cleanup.

Clark testified that, during the relevant time, he took his breaks in the live-haul breakroom with chicken catchers, live-haul drivers, and forklift operators. This room also was used by Shumate and by Second-Shift Live Haul Superintendent Bryce Wilburn. When at Roaring River, he took breaks with feed mill and feed haul personnel.

Robinson, on the other hand, testified credibly that there were no breaktime places established for cleanup employees and that Clark took his breaks wherever he was at the time, whether in live-haul, at the switchroom near the grease trip, or out on his truck. Robinson related that, every night, a number of his other employees would take their breaks in the live-haul breakroom to gain access to vending machines not available at the plant.

Blevins testified that, in April, Regional Vice President Solomon who, inter alia, oversaw the Wilkesboro complex, told him that the Company was going to relocate Clark so that he would punch in near the plant since his truck was going to be left in the forklift shop. In that way, Clark no longer would have to go to ''the bottom,'' punch-in and then come to the complex to work. Solomon also stated that Ray Huffman no longer would be telling Clark what to do and that Clark would be strictly under Tommy Robinson.

The record contains testimony that Clark had received a company ring as a safety award from Live Haul Manager Ray Lovette, thereby tying Clark closer to the live-haul operation. The clearest statement concerning this award came from Ray Huffman who testified that under company policy, after 5 years of accident-free driving each driver was awarded a ring set with a ruby. For each year of safe driving thereafter, a diamond was set around the side of the ring.

Clark became entitled to a diamond addition to his ring for safe driving during the period from May 1, 1988, to April 30, 1989, and, accordingly, the award matured while Clark was still working out of shave and spray. The rings were distributed by a safety official at a supper held at the Elks' Club a week after Thanksgiving 1989. Huffman, on vacation at the time, did not attend the supper.[252]

The record contains conflicting testimony as to whether Clark had attended certain meetings of live-haul employees between April and November, with Clark contending that he had, and others denying this. From the detailed evidence concerning Clark, I do not consider it necessary to resolve Clark's presence at these meetings to determine his status. As explained by Lankford, company payroll records coded Clark's street washer's classification during the relevant April–November interval to show that his pay was being charged to the overall Wilkesboro complex rather than to shave and spray, live-haul, or the plant.

In November, Clark's spray truck broke down and repairs were judged to be too expensive. Accordingly, as of November 30, Clark was transferred to plant sanitation under Robinson's general supervision; his driving was discontinued; his pay was increased by 28 cents an hour to the level of Robinson's other sanitation employees; and the Union does not contend that, after this transfer, Clark continued to be within the live-haul unit.

I credit the Employers' evidence that Clark reported to both Huffman and Robinson before April, while still with shave and spray and that from April to November, after his timecard had been relocated to live haul, he continued to report principally to Plant Sanitation Manager Robinson, subject to additional direction by Blevins. I find no convincing evidence that Clark ever was responsible to scales operator Shumate or to Ray Lovette, live haul manager.

These conclusions are supported by the facts indicating that Robinson and Blevins, alone of Clark's other attributed supervisors, worked hours that coincided with Clark's so as to allow effective knowledge of what Clark was doing and what he still needed to do; that Clark's sanitation duties came squarely within Robinson's area of responsibility; that when the weather did not permit operation of the spray truck, Clark did plant sanitation work for Robinson; that, on August 10, it was Blevins, Robinson, and other plant officials who participated in disciplining him. Although Clark's work was repetitive, closer supervision by company officials who worked the same hours had importance because of the daily

[250] Blevins testified that when he wrote the August 10 disciplinary notice, he was not aware that Clark's ballot had been challenged at the July 27 election.

[251] Except for Clark and eight other employees who cleaned the upstairs part of the plant, trash trucks, etc., the remaining sanitation employees reported to Robinson through four supervisors.

[252] Clark testified that while Huffman had sent the ring out to be fitted with another stone, the finished ring was given to him in April or May by Live Haul Manager Ray Lovette at the end of a private meeting. However, Lovette denied having made the presentation or in having had anything to do with Clark's award. I credit Huffman's account because it is the most clearly recalled, authoritative version. In addition, if the award had been given in April or May by Lovette, as described by Clark, it still necessarily would have been earned for work performed while Clark had been in shave and spray, and Lovette's role in passing it along, at most, would have been incidental.

6 a.m. U.S. Department of Agriculture inspection. I also find that Shumate's work had no inherent supervisory component requiring that he issue instructions involving the exercise of independent judgment. He might inform a live haul driver when he was ready for that truck to drive across his scales and, possibly, could have pointed out some spills on the streets that Clark might want to spray-wash, but such actions would be routine in nature. Ray Lovette, whose regular work hours were in the daytime, also was not situated to have regularly and systematically supervised Clark. Accordingly, I find that from April–November Clark was supervised and, as required, disciplined by Plant Officials Robinson and Blevins and not by live haul personnel.

b. *The challenged ballot of Tony L. Clark—discussion and conclusions*

As more recently restated in *Keeler Brass Co.*:[253]

> whether individual employees are included in the bargaining unit as set forth in the election agreement depends on whether they share a sufficient ''community of interest'' with other unit employees. In *Kalamazoo Paper Box Corp*., 136 NLRB 134 (1962), the Board enumerated the factors to be considered in determining whether individuals have a community of interest apart from other employees such that they would not belong in the same unit:
>
> > [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . .; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Applying the above criteria, I find that during the April–November period when Clark used the live haul timeclock and parked his car in that parking lot, he did not acquire a community of interest with the live haul or Roaring River unit employees sufficient to warrant his inclusion in that unit. Although Clark, during those months, continued to spray-wash around unit locations, including the live haul area, the scales, parking lots, and the relevant Roaring River facilities, his duties also comprehended, as before, spray-washing premises unrelated to the unit. These included areas around the Company's administrative offices, three hatcheries, the main processing plant, and company streets quite removed from the live haul facilities.

The record indicates that Clark's relocation to live haul was an administrative measure to move him, as a functionally distinct employee, nearer to where he performed much of his work—the Wilkesboro complex, itself, rather than just to the live haul department. This was because, although he had performed essentially the same work for about 12 prior years while based at ''the bottom,'' 2 miles from the complex, there is no showing that he had been expected to spray-wash there. Accordingly, Clark had been taking round trip detours of at least 4 miles a day simply to use the timeclock and parking facilities of a place where he served no functional purpose.

Clark's relocation to the live haul facilities and vicinity did not functionally integrate him into the live haul work. His duties were completely unlike those of the chicken-catching crews, including those of the 36 live haul drivers. While certain live haul drivers, during the warmest months, when not out with the chicken-catching crews, would be assigned to drive tank trucks to the farms to spray-cool the chicken houses and chickens, Clark claimed to have performed this cooling function only once in his 13 years of spray-truck driving. At that time, it had been necessary to refit his truck with a hose and fine-spray nozzle, equipment he otherwise did not use.[254] Clark drove his street spray truck throughout the year while, as noted, the live haul drivers spray-cooled only incidentally to their regular work with chicken-catching crews and, then, only in the summer. Clark, who never worked as a chicken catcher, did not interchange with the live haul drivers, and was the only employee to drive his spray truck.

In fact, the record shows that except for those occasions when, as circumstances permitted, Clark was situated to use the live haul breakroom or the Roaring River breakroom for his rest periods, he had little contact with live haul unit employees. The solitary nature of his work separated him from other employees and, except for spray washing the exteriors, his functions were unrelated to the basic feed mill/feed haul work done by Roaring River employees. This situation is not materially changed by the fact that Clark might occasionally fuel his truck at Roaring River service center.

Clark's separation from live haul unit work and those who performed it was further exemplified by his assignment to do plant sanitation work under Robinson on nights when it was too cold to use his truck, rather than live haul/feed haul driving or some other assignment within the bargaining unit. This course was continued in November when he was permanently assigned to the plant after his truck's final breakdown, instead of to a unit position.

While Clark was using the live haul timeclock and parking his car in its lot,[255] his earnings were not charged to live haul, but to the Wilkesboro complex payroll, which premises he generally serviced.[256]

From the entire record, I find that Clark, while using the live haul timeclock, remained as functionally separate and distinct from the work and personnel of the live haul/Roaring River unit as when he had been operating the same spray truck, for essentially the same purposes, when based in shave and spray; that he had not shared a sufficient community of

[253] 301 NLRB 769, 776 (1991).

[254] Clark claims that on two occasions while at shave and spray he also used his truck, refitted, to wash chicken houses.

[255] The record shows that, in the late hours when Clark was parked in the lot while at work, the live haul lot was opened to others besides live haul workers and Department of Agricultural representatives.

[256] The Union's argument that Clark ''interacted'' with feed mill and feed haul employees by cleaning around their areas and because his ''R'' pay code designation was shared with feed service employees is thin. Clark spent more time cleaning around other nonunit areas and his ''K'' code designation was broad enough to also include broiler farms employees, equipment installers, sanitation-supply employees and supervisors, shavings employees, and guards.

interest with members of the live haul/Roaring River unit to warrant his inclusion; and that the challenge to his ballot should be sustained and his ballot not be opened and counted.[257]

2. The objections to the election in Case 11–RC–5583

With one exception, the Union's objections to the election closely parallel certain of the unfair labor practice allegations of the amended consolidated complaints where violations have been found; including, in effect, that the Respondents had ordered employees to cease from, and had threatened to have off-duty employees arrested for, union handbilling during nonworktime and in nonwork areas; had coercively interrogated employees concerning their union activities and sympathies; had promised employee benefits and had threatened retaliation to discourage employee support for the Union. These unfair labor practices, found above, precluded the exercise of a free and uncoerced choice in the election.

Only Objection 7 did not track complaint allegations and was separately litigated. Objection 7 alleges that: ''The Employer or its authorized representative was in the polling area campaigning during the time the polls were open.''

In support of this objection, the Union contends that because, during hours when the July 27 polls were open in Wilkesboro and the election was being conducted, the Respondents' live haul office manager, Commie Johnson, spent extensive time in the breakroom which led directly to the immediate storageroom voting place; that he electioneered while there; and that he entered the storageroom voting area on two occasions while that station was open to receive voters.[258]

The Respondents contend that it was not unusual for Johnson to be in the breakroom since it was necessary for him to pass through there to go to and from his office. Accordingly, he would be in the breakroom 20–25 times during a typical day.[259] The Respondents further point out that both of Johnson's visits to the immediate voting area were very brief, had been to enable him to supply certain items jointly requested by election observers and had occurred when no voters were in the voting place.[260]

As noted, the actual voting was conducted in a 13-by-26-1/2 foot storageroom in the live haul office building located off one corner of the breakroom. The breakroom, at its shortest length, measured approximately 32 by more than 40 feet. Board election notices were posted outside each of the two breakroom entrances and, generally, voters used either of these two doorways to pass through the breakroom in order to reach the immediate voting place. Vending machines were situated along one side of the breakroom and the timeclock and card rack were along another wall. Three pool tables were spaced parallel to each other in the center of the room. A third entryway to the breakroom, not used by voters, opened to the clerical office area, adjacent to one side of the voting area/storeroom. The clerical office area, in turn, led to the office space used by Live Haul Managers Ray Lovette and Johnson.[261]

Employees who, during the election, entered the breakroom used by most voters, proceeded the 32 feet across the width of the room, turned left and proceeded about another 10 feet to the voting place/storeroom entrance. Employees who used the other entryway would continue for more than 40 feet, then bear right and continue about 10 feet more up a corridor to the voting place entrance. Since, as noted, the door to the voting place was recessed up a short corridor at an angle from the breakroom, apparently it would have been quite difficult to see into the immediate polling area from the breakroom.[262] As noted, however, the Board's election notices were posted outside the two doors to the breakroom used by voters coming to the polls, and the breakroom provided the only relevant access to the storeroom voting area.

Johnson testified that, during the July 27 voting hours, he was inside the breakroom 12 to 15 times, aggregating about

[257] *Carpenter Trucking*, 266 NLRB 907 (1982), cited by the Union, is distinguishable. In *Carpenter Trucking*, supra, tank truckdrivers were placed in the same unit with dump truckdrivers because drivers of both types of trucks exercised like skills and because of similarities between certain of the two types of vehicles. In *Carpenter Trucks*, unlike here, there was considerable interchange between the two types of drivers. All tank truckdrivers in *Carpenter Trucks* started with that employer as dump truckdrivers, and tank truckdrivers occasionally drove dump trucks when the tanker business was slow. Before transferring from dump truckdriving to tank truckdriving, dump truckdrivers received training by riding with tank truckdrivers. Moreover, although there were differences in their respective workhours and in certain work conditions, as that decision reflects, each type of driver was work-dependent on performance by the other. In the present matter, Clark was not functionally tied to or integrated in the work of the unit. Clark's use of his truck as the Company's only street washer was unique. He did interchange with other drivers or their vehicles, and unlike live haul and feed mill drivers, he did not work with other vehicle operators to achieve a similar purpose. There also is no evidence that Clark had operated a live haul or feed haul truck on his way to becoming a street wash spray truck operator.

[258] Voting places were established at Wilkesboro and Roaring River for the July 27 election. The Wilkesboro voting was conducted at the storageroom, live haul office building, from 7 to 10:30 a.m., and from noon to 2:30 p.m. Only the Wilkesboro voting facility was involved in this election objection.

[259] Johnson would go through the breakroom from his office to get to the live haul scale, to check on the live chickens in the sheds, and to get to the cage repair shop and back.

[260] The Respondents, consistent with their position that live haul personnel are exempt agricultural workers, deny that Johnson, with responsibilities in live haul, was a supervisor within the meaning of the Act. However, the Respondents agree that Johnson otherwise met the criteria as to authority and function that would establish him as their supervisor and agent within the meaning of Sec. 2(11) and (13), respectively, of the Act if the personnel and work he supervised, in their view, had not been exempt. Since, as noted, the Board has found that live haul employees were not exempt but, properly, were included in the unit, I find that Johnson, who has held his position since 1986, at all material times, was the Respondents' supervisor and agent within the meaning of the Act.

[261] Although Lovette and Johnson, as the Respondents indicate, would have had to pass through the clerical office area and breakroom while going to and from their own offices, they need not necessarily have done so while voting was in progress. Johnson conceded that he had not followed Ray Lovette's example in temporarily moving to a different office away from the the voting place during the election hours.

[262] While employee Jerry A. Spicer, a union observer at the election, testified that it was possible to see into the storeroom place from the breakroom, such testimony appears inconsistent with a detailed drawing of the area in evidence.

2-1/2 hours there. While there during the voting, he saw about 12 employees who apparently did not leave, but who simply remained, apparently loitering, and that he had seen an average of 8–10 employees at a time, lingering, using the vending machines, and standing around the pool tables. Johnson engaged in small talk with 9 or 10 of the employees, discussing topics unrelated to the Union or to the voting, except that he did suggest to employee John Gilreath that Gilreath vote before starting work at 2 p.m. This was because the polls would be closed if Gilreath had waited until he returned to the facility.[263] Johnson denied having seen anyone in the breakroom actually waiting to vote.

Johnson, recalling that James Isaac and Tony Bell were company observers at the election and that Jerry Spicer and James Phillip Church were union observers, testified as to how he had come to visit the storageroom voting area twice during voting hours. He related that he first went to that voting place shortly before 8 a.m. in response to a request by Church and Isaac for ashtrays. Johnson brought some ashtrays from his office to the voting place and left. It is undisputed that he was in the voting place on that occasion for less than a minute.

The second visit was in response to a request, at around 8:30 a.m., for a fan, also by Church and Isaac. Johnson related that, when a fan could not be found in the building, an employee volunteered to bring one from home. After the employee produced the fan, Johnson took it into the voting place, plugged it into a socket, told the Board agent and observers that there was their fan and left. Again, Johnson was there not longer than a minute. Johnson testified without contradiction that no voters were in the polling room during either of his visits. Although the Board agent did not protest his presence, Johnson conceded that he had not identified himself.[264]

Johnson also explained the circumstances under which he had given out three baseball-type caps with the Tyson logo to employees in the breakroom while the election was in progress. When Tyson Board Chairman Don Tyson had visited the Wilkesboro facility in mid-July, soon after the takeover, certain employees who had seen him wear such a cap requested caps for themselves. Tyson promised to send them. A few days later, when the caps arrived, Johnson and other supervisors were instructed to distribute them and to tell the recipient employees that Don Tyson had sent them.

Accordingly, 2 or 3 days before the election, the supervisors had given the Tyson baseball caps to each of their crewmembers. However, they left 15 to 18 caps, intended for certain employees they could not reach, in Johnson's office, requesting that he store and distribute them. Johnson thereafter gave about 15 of these caps to employees—handing out about 5 caps before July 27; approximately another 5 on the July 27 election date; and the same number after the election. Johnson testified, however, that on the day of the election, he only gave caps to employees who had requested them. In this fashion, Johnson gave three caps to employees in the breakroom while the polls were open. When the employees had asked him for these caps, Johnson obtained them from his office and took them to the breakroom, telling the employees only that Don Tyson had sent them the caps.[265]

In accordance with *Marathon Metallic Building Co*.,[266] Johnson's two brief visits to the storeroom voting area do not warrant setting aside the election. Whether or not Johnson identified himself as a supervisor to the Board agent, Johnson, on each occasion, had remained in the voting area for no more than a minute before leaving of his own accord. Both of his visits had been in response to joint requests by company and union observers for ashtrays and a fan for their use and the evidence indicates that no voters were present in the voting place while he was there. I do not find voter intimidation from these two incidents.

The remaining question in this area is whether Johnson's admitted conduct in passing out three Tyson baseball caps in the breakroom during voting hours to employees who had requested them constituted electioneering that would warrant setting aside the election. As restated by Administrative Law Judge Herzog in his Board-approved decision in *Antenna Department West*:[267]

> In *Milchem, Inc*., 170 NLRB 362 (1968), the Board concluded that, in order to prevent electioneering by parties to the election among employees preparing to vote, and to protect employees from distraction, pressure, and unfair advantage from prolonged conversations during the important final minutes before employees cast their ballots, a ''strict rule'' against such conduct, without inquiry into the nature of the conversations, was warranted. The only exceptions announced to this rule were that trifling, chance, isolated, and innocuous comment or inquiry by an employer or union official would not *necessarily* void an election.

Milchem, then, was intended to prevent electioneering by parties to the election among employees preparing to vote so as to protect them from the above undesirable consequences of such electioneering in the critical period just before the employees voted.

Here, there is no evidence showing either that employees who accepted the Tyson caps from Johnson had not asked for them,[268] or that any of the employees who received the caps, or who had witnessed their distribution, if any, had then been waiting to vote. Johnson was the only witness to testify concerning the distribution of these Tyson caps and, in the absence of evidence to the contrary, his account must be credited. From the foregoing, I conclude that Johnson's distribution of the Tyson baseball caps to three employees in the breakroom during the election does not warrant setting aside the election. Also, without condoning the extended time Johnson spent in the breakroom during voting hours,

[263] I do not find Johnson's neutral statement to Gilreath suggesting that he vote before leaving, to constitute electioneering or, otherwise, to be of significance.

[264] Union observer Spicer generally agreed with Johnson's testimony, but claimed that Johnson had identified himself to the Board agent as Ray Lovette's assistant when providing ashtrays during his first trip to the voting place, and that he had remained there on that occasion slightly longer than was described by Johnson.

[265] At the end of the voting, the company observers, as directed, did not sign the certificate approving conduct of the election.

[266] 224 NLRB 121, 125 (1976).

[267] 266 NLRB 909, 914 (1983).

[268] Distribution by an employee of antiunion material is not unlawful absent some form of coercion or pressure on employees to receive the material. *McDonald's*, 214 NLRB 879, 881–883 (1974).

such conduct, by itself, similarly does not provide grounds for setting aside the election.

In view of the bargaining order found applicable herein, it is recommended that the election in Case 11–RC–5583 be set aside and that that representation proceeding be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondents set forth in section III, above, occurring in connection with the Respondents' operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Tyson Foods, Inc., at all material times herein since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several lability to remedy Holly Farms' unfair labor practices found herein.

3. Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 567, and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Unions), are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long-distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long-distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Unions.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining, and enforcing a rule which prohibits employees from distributing materials in nonwork areas on the Respondents' property during nonwork hours.

(h) Respectively, threatening and causing the arrests of their employees for distributing union materials in nonwork areas on the Respondents' property during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork area of the Respondents' premises during nonwork hours.

(k) Repeatedly disciplining their employees by issuing written warnings to them because of their union activities.

(l) Promulgating, maintaining, and enforcing a rule which prohibited their employees from discussing wages with other employees.

(m) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the Unions as their bargaining representative.

(n) Repeatedly coercively interrogating their employees concerning their union activities, sympathies, and desires.

(o) Prohibiting employees from wearing union hats or insignia and by threatening retaliation for such conduct.

(p) Discriminatorily prohibiting the posting of union materials on the Respondents' bulletin boards.

(q) Threatening their employees with discharge if they should chose the Unions as their bargaining agent.

(r) Threatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not choose the Union as their bargaining agent.

(s) Threatening their employees that the Respondents' management would know how they voted in the scheduled representation election should they choose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman Jr., and Joseph Richardson.

(b) Constructively discharging their 47 employees named below:

Earl Howell	Jerry Fisher
Fred Royal	R. J. Absher
Gene Harris	Clark McNeil
Danny Osborne	Earl Eller
Bill Ray Johnston	Jerry Blackburn
Dan Wingler	Kenneth Eller
Ray Kanupp	Sam Badgett
George Glass	Robert Crook
Bryant Welborn	Harden Branscome
James Spicer	Bill St. John
Mike Hamby	Mike Dancy
Mike Maudlin	Thomas Roope
Thomas Alexander	David Laney
Larry Eldreth	Zane Filipic
Donnie McClary	Denny Patrick
David Anderson	Romey Nelson
Butch Miller	David or Danny Howell
Gene Hester	Jerry Mealy
James Sparks	Patrick Owens
George Barber	Donnie Blackburn
Teddy Ray Hayes	Jerry Miller
Steve Eller	Michael Simmons

Curtis Eastridge Mike Staley
Donald Dollar

(c) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome by the issuance of written warnings.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9(a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Seguin and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

7. At all times since March 24, 1989, the seven above-named Teamsters local unions (the Unions) have been, and are, the exclusive jointly certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act on and after August 8, 1989, by:

(a) Announcing to the Unions that they were going to unilaterally integrate their employees within the former Holly Farms transportation department western division, into the Tyson Transportation system.

(b) Announcing to the Unions that the former Holly Farms eastern transportation division would be unilaterally reduced by the layoff of 71 drivers and the removal of 47 tractors.

9. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 12, 1989, by:

(a) Announcing to the Unions, respectively, that they unilaterally were going to completely integrate the former Holly Farms transportation department, eastern and western divisions, into the Tyson Transportation system; that the Respondents unilaterally were going to change the wages, work locations, hours of employment, and other terms and conditions of employment of the bargaining unit employees, while offering to bargain only about the effects of such decisions.

(b) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours, and other terms and conditions of employment.

(c) Withdrawing recognition from the Unions as the exclusive collective-bargaining representatives of the employees in the above-described unit, and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining representative of the employees in the said unit.

(d) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc., and Holly Farms Corporation.

10. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 22, 1989, by:

(a) Effectuating the previously announced integration of the former Holly Farms transportation department, eastern and western divisions, into the Tyson Transportation system.

(b) Unilaterally changing the wages, hours, work locations, and other terms and conditions of employment of employees in the above-described unit.

(c) Constructively discharging the 47 above-named unit employees for refusing to continue their employment with the Respondents under the unilaterally imposed wages, hours, and other conditions of employment.

(d) Unilaterally changing the absentee call-in policy as to when employees, to avoid discharge, must report their absences to the Respondents.

(e) Announcing to employees that, at a specified later date, the existing Holly Farms pension plan covering bargaining unit employees would be unilaterally discontinued and the proceeds paid out.

11. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the Respondents' above-described unfair labor practices.

12. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

13. On or about March 31, 1989, Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) separately represented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

14. The Respondents have violated Section 8(a)(5) and (1) of the Act by failing and refusing, since April 3, 1989, to recognize and bargain with the above-named Union as the exclusive bargaining representative of the employees in the immediately above-described unit.

15. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Respondent's unlawful conduct interfered with the representation election held on July 27, 1989, in Case 11–RC–5583.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. For the reasons set forth above, I shall recommend that the Respondents be ordered, on request, to bargain collectively with the seven above-named Teamsters local unions as the jointly certified exclusive bargaining representative of the employees in the above-described drivers-yardmen unit, and with Local 391 as the exclusive collective-bargaining rep-

resentative of the employees in the above-described unit which includes live haul employees.

Since the Respondents, under current Tyson management, have not honored the certification of representative which the Board issued to the seven above-named Teamsters local unions on March 24, 1989, I will recommend that the certification year be extended to run for a period of 1 year commencing from the date the Respondents begin to bargain in good faith and that the Respondents be required to bargain with the Unions during that period as if the year following certification had not expired.[269]

Having found that the Respondents breached their bargaining obligations under the Act with respect to the drivers-yardmen unit by withdrawing recognition from the Unions as the certified bargaining representative of the employees in that unit and by instituting unilateral changes affecting wages, hours, work locations, and other terms and conditions of employment, and to restore as nearly as possible the status quo ante, I shall recommend that the Respondents, on request, be required as to its employees within the drivers-yardmen unit, as amended above, to recognize and bargain with the Unions and to reinstate the work scheduling, rates of pay, road fees and benefits plans, and the work rules that had been in effect for such employees on September 12, 1989, before the Respondents' unlawful unilateral changes. The Respondents also should be required to make whole its employee-members of the drivers-yardmen unit for any losses they may have sustained since September 22, 1989, by having been unlawfully required to work since that date under the Respondents' unilaterally imposed unlawful changes by paying to those employees sums equal to what they would have earned from mileage driven and/or from other forms of compensation under the pay and benefits plans and road fee schedules, as available to them on September 12, and their earnings under the Tyson pay and benefits plans and road fee schedules since September 22, 1989.[270] Any such earnings differentials should be computed to the extent appropriate as prescribed in *Ogle Protection Service*.[271]

Having found that Respondents unlawfully discharged Patricia Barker, Raymond K. Huffman Jr., Alvin Bouchelle, and Joseph Richardson, and that, on September 22, 1989, they constructively discharged the 47 above-named employees, and have refused to reinstate all of the foregoing, the Respondents should be required to offer all of the aforesaid individuals, whether directly or constructively discharged, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make each of them whole for any loss of earnings suffered as a result of the Respondents' unlawful conduct by payment of sums equal to those which they would have earned absent the unlawful conduct against them, with backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*,[272] with interest as computed in *New Horizons for the Retarded*.[273]

While the Respondents, on request, should be required to rescind unilateral changes affecting the drivers-yardmen unit since September 22, 1989, this should not be construed as requiring the Respondents to cancel any wage increases or other improvement in wages without request from the Unions.

Having also found that the Respondents unlawfully issued written warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester, and James Phillip Church, they should be required to rescind those warnings. References to all disciplinary proceedings found unlawful herein, whether to the aforesaid warning notices, to the above-noted discharges and constructive discharges, or to any employees disciplined under unlawfully changed policies and work rules, should be removed from the personnel files of the affected employees, and such disciplinary actions should not be considered in any future personnel actions against these employees. The affected employees should be notified in writing that such expunction has been completed.

Having found that the Respondents have failed and refused to furnish the Unions with a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation, as requested, and that such document is necessary to the performance of the Unions' bargaining responsibilities, the Respondents, on request, should be required to provide the Unions with a complete copy of that document.

Having found that the Respondents unlawfully announced that the pension plan in effect for employees as of September 22, 1989, will be terminated and paid out at a specified later date, the Respondents should be required, on request, to rescind that announcement and bargain with the above-named Unions concerning retirement plans. If applicable, the Respondents should be required to reinstate the original pension plan retroactively to the date on which it was discontinued and make whole any employees adversely affected by that unlawful unilateral change.

Having found that the Respondents unlawfully changed their absentee call-in policy by requiring that, to avoid discharge or other discipline, employees must call in to report their absences to the Respondents within 2 days instead of

[269] *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Hydrotherm, Inc.*, 302 NLRB 990, 1006 (1991).

[270] Contrary to the Respondents, I find that the unit drivers' backpay entitlements were not reduced because Tyson assertedly had offset its unilateral reductions in mileage rates and other forms of compensation by requiring that its employees accumulate more lower paid mileage each pay period than had Holly Farms, which policy resulted in greater gross earnings. The unnegotiated extra mileage required by Tyson, in itself unlawful, should not obscure the unilateral changes which deprived the drivers of previously available higher mileage rates and of other fees favorably affecting their earnings while requiring less work.

[271] 183 NLRB 682 (1970). As the record indicates that changes in pay rates, road fees, work locations, work scheduling, and other terms and conditions of employment occurred on different dates for eastern and western division unit employees, it will be left to the compliance stage of this proceeding to determine precisely when such changes, respectively, occurred in determining applicable retroactivity dates.

[272] 190 NLRB 289 (1971).

[273] 283 NLRB 1173 (1987). In accordance with the decision in *New Horizons for the Retarded*, supra, interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. The foregoing reinstatement and make-whole remedies also should be applied to any employees who were discharged or otherwise disciplined by virtue of the unilaterally changed absentee call-in policy found unlawful above, or pursuant to other unlawfully changed work rules.

3 days, as before, the Respondents, on request, should be required to rescind this unilaterally changed policy and bargain with the above-named Unions concerning absentee call-in requirements.

As a bargaining order has been found appropriate with respect to the unit which includes live haul employees, it is recommended that the election held in Case 11–RC–5583 be set aside and that the petition in that matter be dismissed.

Since the strike herein has been found to be an unfair labor practice strike, on their unconditional application to return, the Respondents shall be required to offer immediate reinstatement to all striking employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, without loss of seniority and other rights and privileges, dismissing, if necessary, any persons hired as replacements on or after October 1, 1989. Backpay for such striking employees shall commence 5 days after they respectively make unconditional application to return to work and continue to accrue until the date when the Respondents offer reinstatement, in the absence of lawful justification for the Respondents' failure to make such an offer.[274] In the event that backpay for striking employees becomes applicable because of the Respondents' unjustified refusal to offer reinstatement to those who should make unconditional application for same, such backpay shall be calculated in the manner previously set forth for discharges in this remedy section.

As the unfair labor practices found herein are serious, pervasive, numerous, and calculated, affecting employees in more than two bargaining units, and are attributable to the highest levels of the Respondents' management, it is clear that the Respondents have evidenced a readiness to violate the Act to such degree as to warrant recommending that the Respondents be restrained by a broad cease-and-desist order.[275]

[Recommended Order omitted from publication.]

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[274] *Drug Package Co.*, 228 NLRB 108 (1977).

[275] *Hickmott Foods*, 242 NLRB 1357 (1979).